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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-642

EMPIRE CONSTRUCTION, INC.,
an Oklahoma Corporation
Petitioner

VERSUS

CITY OF TULSA, OKLAHOMA,
a Municipal Corporation
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

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October 10, 1973

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EMPIRE CONSTRUCTION, INC.,
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VERSUS

CITY OF TULSA, OKLAHOMA,
a Municipal Corporation
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

The petitioner, EMPIRE CONSTRUCTION, INC., an Oklahoma Corporation, prays that a writ of certiorari issue to review the opinion and judgment of the Supreme Court of the State of Oklahoma rendered in these proceedings on June 19, 1973 (rehearing denied on July 17, 1973), inasmuch as it affects the rights of all landowners in the State of Oklahoma* and the United States. According to Public Land Statistics 1972 at page 10, the Federal Government, as of June 30, 1971, owned 760,203,563.3 acres, or ONE-THIRD of all the land in the United

States, with 55,409,932.3 acres thereof being acquired by eminent domain or other similar proceedings. The above figures do not include land owned by states, counties and municipalities. These figures evidence the impact and the overriding public importance of the questions raised herein.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Oklahoma in this case (Appendix A, infra, pp. 1 - 9) is reported at 512 P.2d 119.

The opinion of the Court of Appeals of the State of Oklahoma, Division Number 1 (Appendix B, infra, pp. 1 - 8) was not reported.

The opinion of the District Court in and for Tulsa County, Oklahoma, (Appendix C, infra, pp. 1 - 2) was not reported.

JURISDICTION

The judgment of the Supreme Court of the State of Oklahoma was entered on June 19, 1973. The petitioner thereafter filed its petition for rehearing which was denied on July 17, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3), inasmuch as the ~~judgment of the Supreme Court of the State of Oklahoma~~ City of Tulsa has infringed upon and denied the petitioner the rights and privileges of using, enjoying, developing, selling, or otherwise disposing of its property, consisting of approximately eight (8) acres of vacant land, since June, 1957, by publicly announcing, without ever im-

plementing, its intention to acquire the said property for the Riverside Expressway, part of the Master Expressway Plan of the City of Tulsa, Oklahoma, all of which constitutes a taking without just compensation, contrary to the Oklahoma Constitution, Article 2, Section 24, and to the United States Constitution, Articles V and XIV.

QUESTIONS PRESENTED

1. Whether the acts of the respondent in continuously declaring publicly its intention to acquire petitioner's property since 1957 constitute a "taking" and "freezing" of petitioner's property without due process of law in contravention to the Oklahoma Constitution, Article 2, Section 24, and the United States Constitution, Articles V and XIV.

2. Whether the petitioner is entitled to just compensation under the Constitutions of the State of Oklahoma and the United States.

3. Whether a divestment of title or physical invasion of property is required to "take" property under the Constitutions of the State of Oklahoma and the United States.

4. Whether the factum of a "taking" is a question of law for the Court or a question to be determined by a jury.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment V:

> "No person shall . . . be deprived of life, liberty, or property without due process of law; nor shall

private property be taken for public use, without just compensation."

Constitution of the United States, Amendment XIV:

". . . No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article 2, §24, Constitution of the State of Oklahoma:

"Private property shall not be taken or damaged for public use without just compensation . . ."

STATEMENT OF FACTS

On or about June 25, 1957, the defendant, City of Tulsa, announced a Master Expressway Plan which provided that Riverside Drive would become a limited access expressway, and further provided for the realignment, enlargement, relocation and conversion of said Riverside Drive through all of plaintiff's real property, the fair market value of which was and is in excess of $275,000.00. Said real property comprises approximately eight (8) acres of vacant land and is more fully described as follows:

All that part of Lot 7 in Section 13, Township 19 North, Range 10 East of the Indian Base and Meridian, Tulsa County, Oklahoma, lying South of the Midland Valley Railway Company right of way and East of the Easterly right of way line of Riverside Drive according to the Government Survey thereof.

The said Master Expressway Plan was announced

and publicized to the general public by means of various reports in the principal Tulsa newspapers, a few of which were as follows:

1. June 2, 1957, an article entitled "Expressway Systems Outlined." (Exhibit D, attached to Plaintiff's petition, which is annexed hereto as Appendix F)

2. June 26, 1957, an article entitled "Master Expressway Plan Bared." (Exhibit E, attached to Plaintiff's petition, which is annexed hereto as Appendix F)

3. October 18, 1957, an article entitled "Expressway Routes Listed." (Exhibit F, attached to Plaintiff's petition, which is annexed hereto as Appendix F)

In addition to the above, the Tulsa Metropolitan Area Planning Commission recommended to the Board of City Commissioners of the City of Tulsa, the Governing Board of said City, that said Master Expressway Plan be approved. Thereafter, on July 26, 1957, the said Board of City Commissioners did formally pass, adopt, and approve a resolution adopting said Master Plan, thereby impressing the future use of plaintiff's property for said Expressway Plan on the public.

For a period now in excess of sixteen years and continuing to the present time, the widely publicized projected use of plaintiff's property has remained a reality, but no steps have been taken to acquire the plaintiff's real property or to initiate the construction of said Riverside Expressway, and the defendant City of Tulsa has failed or refused to cancel or officially with-

draw said plan thereby "freezing" plaintiff's said real property in a state of economic unproductivity thwarting its use for any reasonable purpose and interfering with plaintiff's power of disposition, all of which has left plaintiff's property in a state of PRECONDEMNATION BLIGHT.

The petitioner filed its original petition on October 2, 1967. The petition recited that the City of Tulsa announced a Master Expressway Plan for the City of Tulsa which provided that Riverside Drive would be realigned and relocated so as to traverse and require the taking of all of the petitioner's real property, all of which appeared in the principal Tulsa newspapers. Subsequent to the public announcements, the City Commissioners, after studying the specific route of the said Expressway, formally adopted and approved the said Master Expressway Plan by Resolution, a copy of which is annexed hereto as Appendix D, on July 26, 1957.

The petition alleged that the said acts and the subsequent failure to construct said Expressway or implement said Master Expressway Plan for a period in excess of ten years, coupled with the City of Tulsa's failure and refusal to withdraw said Expressway Plan, deprived the petitioner of said real property thereby "freezing" the same, constituting a "taking" without just compensation contrary to Articles V and XIV of the Constitution of the United States and Article 2, Section

24 of the Constitution of the State of Oklahoma, as evidenced by paragraphs 3 - 8 on pages 1 - 4 thereof and paragraph 9, which states:

> "Said 'freezing' or restriction of said real property has substantially interfered with the plaintiff's beneficial use thereof and constitutes a taking without just compensation, contrary to the Oklahoma Constitution, Article 2, Section 24, and to the United States Constitution, Articles V and XIV."

On December 4, 1967, the City of Tulsa filed General and Special Demurrers to petitioner's petition, and on August 27, 1971, said Motions were sustained, as evidenced by Appendix C.

Thereafter, the petitioner perfected its appeal to the Supreme Court of the State of Oklahoma and the case was then reassigned to the Court of Appeals, Division 1. In its original brief and reply brief, petitioner contended that its property had been "taken" and "frozen" resulting in a deprivation of its property without due process and without just compensation, all of which is contrary to the Constitution of the United States. The Court of Appeals thereafter on January 9, 1973, reversed the Order of the District Court and remanded the same back to said Court, as evidenced by Appendix B, attached hereto. On March 23, 1973, the City of Tulsa filed a Petition for Certiorari which was granted by the Supreme Court of Oklahoma. On June 19, 1973, the Supreme Court of Oklahoma reversed the Court of Appeals.

In so reversing the Court stated at page 8 of its Order:

> "We think it is sufficient to say that on the basis of Oklahoma decisions, plaintiff's petition as amended, does not set forth facts sufficient to state a cause of action in inverse condemnation for the taking or damaging of its property under the Oklahoma Constitution and statutes nor under the United States Constitution . . ."

On July 17, 1973, the Supreme Court of Oklahoma denied petitioner's petition for rehearing as evidenced by Appendix E, necessitating this Petition for Certiorari.

REASONS FOR GRANTING THE WRIT

I. The federal questions herein have not heretofore been specifically determined by this Court and are questions of overriding public importance.

The basic question in this case apparently has never come before this Court. However, this is a case of major importance affecting the rights of every landowner in the United States. As stated at the outset, the United States Government already owns ONE-THIRD of all land in the United States.* If the land owned by municipalities, counties and states is added to this figure, it would probably reflect that Government owns one-half of the land in the United States. Every landowner's real property is subject to being taken by any one of these branches of government. At the present time, in the State of Okla-

homa alone, the various owners of 13,000 acres of land are in the same position as the petitioner herein. For these reasons, guidelines should be established by this Court to prevent an abuse of the power of eminent domain of the character demonstrated in the case at bar.

The facts as they appear in the petition and amendments, annexed hereto as evidenced in Appendices F, G and H, and as set out hereinabove, are uncontroverted. It is undisputed that the City of Tulsa committed every alleged act.

The continuous acts and announcements by the defendant over the past sixteen years have been disastrous to the petitioner from a financial standpoint. The spector of condemnation precludes development and has rendered the said property virtually unmarketable even though, as vacant land, its potential lies in the development and financing thereof.

Is it possible that a landowner such as the petitioner can be denied and deprived of the free use and enjoyment of its property and be left only with the burden of paying taxes thereon for a period in excess of sixteen years without any compensation therefor? The trial court found that the acts of the City of Tulsa did not constitute a "taking" because it had not physically invaded the property or divested the owner of title. The Oklahoma Supreme Court affirmed this finding.

While it appears that this Court has not had this specific question before it, it has considered and discussed what constitutes a "taking". It would appear that the position with regard to a "taking" is contrary to that adopted by the Oklahoma Supreme Court in the case at bar.

> "In its primary meaning the term 'taking' would seem to signify something more than destruction for it might well be claimed that one does not take what he destroys. But the construction of the phrase has not been so narrow. The courts have held that the deprivation of the former owner rather than the accretion of a right or interest to the sovereign constitutes the taking. *Governmental action short of acquisition of title or occupancy has been held if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter to amount to a taking.*"[1] (Emphasis added)

> "The Constitutional provision is adopted for the protection of and security to the rights of the individual as against the government and the term 'taking' should not be used in an unreasonable or narrow sense . . . but it should include cases where the value is destroyed by the action of the Government or . . . exclusion of the owner from its enjoyment . . . In either of these cases it is a taking within the meaning of the provision of the constitution."[2]

This Court has recognized and held that a "taking"

[1]United States v. General Motors Corp., 323 U.S. 373, 65 S.Ct. 357, 89 L.Ed. 311 (1945).

[2]Piersall v Board of Supervisors, 42 N.W. 77.

may occur in certain instances even though the state or governmental agency has not taken actual possession of the land or divested the owner of title. This Court held that there is a "taking" when a landowner is deprived of the use and enjoyment of his land in instances where airplanes fly regularly at low altitudes over the property causing substantial noise and vibration; where land is ruined for agricultural purposes by underflow from a government dam; where the government fires projectiles over the land during artillery practice; where gas and smoke from a railroad tunnel render property less inhabitable; and where a temporary condemnation of a business property deprived the owner of the going-concern value of his property.[3]

The petitioner submits that the decision of the Supreme Court of Oklahoma in the case at bar is contrary to the holdings of the Supreme Court of the United States, aforementioned. The petitioner further submits that when a landowner is denied his Constitutionally guaranteed rights of ownership, his property

[3]Griggs v. Allegheny County, 369 U.S. 84, 82 S.Ct. 531, 7 L.Ed. 2d 585 (1963); United States v. Causby, 328 U.S. 256, 66 S.Ct. 1062, 90 L.Ed. 1206 (1946); Portsmouth Harbor Land & Hotel Co. v. United States, 260 U.S. 327, 43 S.Ct. 135, 67 L.Ed. 287 (1922); United States v. Kansas City Life Ins. Co., 339 U.S. 799, 70 S.Ct. 885, 94 L.Ed. 1277 (1950); Richards v. Washington Terminal Co., 233 U.S. 546, 34 S.Ct. 654, 58 L.Ed. 1088 (1941); United States v. General Motors Corp., 323 U.S. 373, 65 S.Ct. 357, 89 L.Ed. 311 (1945); Kimball Laundry Co. v. United States, 338 U.S. 1, 13, 69 S.Ct. 1434, 93 L.Ed. 1765 (1949).

is taken, whether it be by words and deeds of a governmental agency or municipality or by some other event, and no distinction should be made.

> "If a State Agency can deliberately trespass on and destroy the property of a citizen . . . then the constitutional guaranty of the right to own and dispose of property becomes nothing more than a tinkling of empty words."[4]

A situation very similar to the case at bar occurred in Pennsylvania in 1915. There, the City of Philadelphia passed an ordinance and announced its intention to build a parkway. After ten - twelve years, many property owners were still waiting for the City to acquire their property. In reversing an order quashing the petition of appellant the Court observed:

> "It must be conceded that there is a long line of cases relating to the laying out, opening, widening, and grading streets, lanes, and alleys in the municipalities of the commonwealth which sustain this position . . . . These cases do hold that the mere plotting of a street upon the city plan, without anything more, does not constitute a taking of land in the constitutional sense so as to give an abutting owner the right to have damages assessed; the theory being that the marking of a new street upon the city plan is nothing more than the expression of an intention to take the land when the occasion arises for opening the projected street as a public highway. The doctrine is founded upon equitable considerations and a wise public policy. It is

[4]City of Jacksonville v. Schumann. 167 S.2d 95 (Fla. 1964).

in aid of the development, growth, and expansion of municipalities. As applied to unimproved land in urban districts, it is beneficial to the owners of real estate, and in most instances greatly appreciates the value of the land remaining after the street is opened. When the streets are plotted, landowners, prospective purchasers, municipal authorities, and all interested persons have a definite chart to guide their future actions. Lots can be laid out and made available for sale; buildings can be erected so as to conform to the lines of projected streets; and in this way the expansion of the city and growth of its population can be facilitated. These considerations were given due weight when the rule as to plotted, but not opened, streets was originally adopted. As applied to the plotting of streets through unimproved land, or as to projected streets in sparsely settled urban communities, the principle is sound, and there is no disposition on the part of this court to make a departure from the settled rule of our cases . . . .

"It now remains to be determined how much of what has been said applies to the facts of the present case. *The construction of the parkway is not an ordinary or usual undertaking on the part of the city; it is unusual and extraordinary.* (Emphasis added)

". . . we are asked to regard this case as if it were the simple plotting upon the city plan of a projected street through unimproved land. *Statement of these facts is sufficient to show that the rule in its essence was never intended to apply to a case like the one at bar* . . . (Emphasis added)

"The municipal arm of the city has lain upon all

properties within the lines of the parkway, with such restrictions and limitations as are implied thereby, for a period of about twelve years. *New buildings cannot be erected, nor can valuable improvements be made, without risk of loss.* Rental values have been depreciated and general market values seriously affected. Certainly this condition of affairs should not be permitted to continue indefinitely without redress to property owners who are injured thereby." (Emphasis added)[5]

The effect of the holding in the case at bar is that landowners have no property rights; that a Municipal corporation can "take" and "freeze" property *ad infinitum* without payment therefor, and that there must be physical invasion before compensation is justified or required. This holding is against the very principles upon which this country was founded.

The Supreme Court of Pennsylvania recognized this fact in *Miller v. City of Beaver Falls*[6] in 1951:

" 'The law as to what constitutes a taking has been undergoing a radical change during the last few years. Formerly it was limited to the actual physical appropriation of the property or a divesting of title, but now the rule adopted in many jurisdictions and supported by the better reasoning is that when a person is deprived of any of certain rights in and appurtenant to tangible things, he is to that extent deprived of his property, and his property may be taken, in the constitutional sense, though his title

[5]In re: Philadelphia Parkway, 250 Penn. 257, 95 Atl. 429.
[6]82 A.2d 34 (1951).

> and possession remain undisturbed; "and it may be laid down as a general proposition, based upon the nature of property itself, that, whenever the lawful rights of an individual to the possession, use or enjoyment of his land are in any degree abridged or destroyed by the reason of the exercise of the power of eminent domain, his property is, pro tanto, taken, and he is entitled to compensation.'"

At page 6-14 of *Nichols on Eminent Domain*[7] it states:

> "Constitutional rights rest on substance, not on form, and the liability to pay compensation for property taken cannot be evaded by leaving the title in the owner, while depriving him of the beneficial use of the property."

The term property includes "the unrestricted right to use, enjoy and dispose of the land."[8] And it is generally held that "private property" forbidden to be "taken or damaged without just compensation" is "not limited to the tangible subject matter or corpus of the property, but includes the right of use and enjoyment of it, so that when such rights are destroyed or taken for public use, the owner thereof is entitled to compensation."[9]

The time has come when municipalities and Governmental Agencies must be and should be stopped from depriving landowners of the free use and enjoyment of their property without compensation therefor,

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[7]Vol. 2, Section 6.1(1).

[8]Martin v. Port of Seattle, 391 P.2d 540, 543 (Wa. 1964).

[9]11 McQuillin, Municipal Corporations (3rd Ed.) Sec. 32.13 at 289.

contrary to their Constitutional Guarantee, as in the case at bar.

It should be noted that the Supreme Court of Oklahoma never mentioned, overruled, or distinguished its holding in *Henthorn et ux v. City of Oklahoma City, a Municipal Corporation*, wherein it observed:

> "Ordinarily, the question of whether a continued interference is substantial enough to constitute a 'taking' under Section 24, Article 2, Constitution is one for the jury."[10]

And yet, it refuses the petitioner its day in Court by its finding as a matter of law that no "taking" has occurred.

CONCLUSION

No reasonable, prudent man would purchase or develop vacant land which is under a continuing threat of condemnation. This petitioner's land has been under this threat for sixteen years, and still the City of Tulsa refuses to implement or abandon its plan. For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of Oklahoma.

Respectfully submitted,

Robert L. Davidson, Jr.

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404 South Boston
Tulsa, Oklahoma 74103
Counsel for Petitioner

[10] 453 P.2d 1013 (Okl. 1969).

CERTIFICATE OF SERVICE

I hereby certify that three true and correct copies of the above and foregoing Petition for Writ of Certiorari were delivered to David Nelson at the Office of the City Attorney, City of Tulsa, 200 Civic Center Building, Tulsa, Oklahoma, this 10th day of October, 1973.

John E. Robertson

APPENDIX

APPENDIX A

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

No. 45,200

EMPIRE CONSTRUCTION, INC.,
an Oklahoma corporation,
Appellant,

vs.

CITY OF TULSA, OKLAHOMA,
a municipal corporation,
Appellee.

SYLLABUS

Under Article 2, § 24, of the Oklahoma Constitution, and Title 11 O.S. 1961 and 1971, § 670, [which latter makes the statutes concerning condemnation for railway purposes applicable to condemnation by municipalities, Harn v. State ex rel Williamson, 184 Okl. 306, 87 P.2d 127], and Title 66 O.S. 1961 and 1971, §§ 51-56, both inclusive [which in all respects material to this case are identically the same as S.L. 1907-08, Article 1, C. 20, pp. 258, 261], where an owner's property is not taken and his proprietary right not disturbed, he is not entitled to damages in an inverse condemnation proceeding.

CERTIORARI TO THE COURT OF APPEALS, DIVISION NO. 1

On appeal from an order and/or judgment of the District Court in Tulsa County, Honorable Robert D. Simms, Judge, sustaining defendant's demurrers to plaintiff's petition, the Court of Appeals affirmed said

order as to plaintiff's second alleged cause of action, but reversed as to its first cause of action and remanded the case for trial on the latter cause. Defendant seeks certiorari.

CERTIORARI GRANTED; DECISION OF COURT OF APPEALS AFFIRMED IN PART AND REVERSED IN PART; DISTRICT COURT'S ORDER AND/OR JUDGMENT AFFIRMED.

Houston, Davidson, Jacoby, Sonberg, Main & Nelson, and John E. Robertson, Tulsa, Oklahoma,	For Appellant,
Waldo F. Bales, City Attorney, and David Nelson and Samuel C. Stone, Assistant City Attorneys, Tulsa, Oklahoma,	For Appellee,
Floyd W. Taylor, General Counsel, Oklahoma Department of Highways, Oklahoma City, Oklahoma,	For Amicus Curiae, State of Oklahoma, ex rel Oklahoma Department of Highways of the State of Oklahoma,
Roy H. Semtner, Municipal Counselor, and Wm. O. West, Assistant Municipal Counselor, Oklahoma City, Oklahoma,	For Amicus Curiae, The City of Oklahoma City, a municipal corporation.

BARNES, J.:

This appeal arose out of an action by Appellant

[plaintiff] against the Appellee [defendant] for alleged damages to plaintiff's property on account of a proposed, but unfulfilled, plan to condemn the property for use in the construction, through the defendant City, of a system of limited access expressways known as the "Master Expressway Plan."

Plaintiff's first alleged cause of action was in the nature of one for inverse condemnation. Its theory was that the announced plan to build the expressway through the property amounted, in effect, to an indirect taking, or "expropriation" of it, without compensation. Plaintiff asked for the appointment of appraisers to determine the property's value. Plaintiff's second cause of action was for damages, based upon alleged slander of its title, by the publicity given the proposed plan.

The District Court sustained defendant's demurrers to plaintiff's amended petition as to both alleged causes of action. The Court of Appeals reversed said ruling as to the first alleged cause of action, and affirmed as to the second. We grant the Appellee's petition for certiorari, and, on consideration, conclude that the Appeals Court erred in its decision with respect to the alleged cause of action in inverse condemnation.

As to this first alleged cause of action, defendant's

demurrer raised the question: Whether, in the absence of an actual invasion of land, or of governmental interference with the owner's right to use the same, may inverse condemnation be maintained?

Defendant's property consists of eight acres of unimproved land located at the corner of Tulsa's East 31st Street and Riverside Drive. A part of the aforementioned Master Expressway Plan is the proposed conversion of Riverside Drive into a limited access expressway to speedily shuttle traffic north and south between the Skelly By-Pass [existing limited access expressway which traverses the south side of Tulsa in an easterly-westerly direction] and an expressway to be known as the "Inner Dispersal Loop," circling Tulsa's downtown business district. When this Loop and the urban portions of Broken Arrow, Crosstown, Cherokee, Osage, Keystone, and Red Fork Expressways are completed, traffic from and to them, as well as from and to the proposed Riverside Drive Expressway, will have rapid ingress and egress to Tulsa's downtown business district, or may travel overhead around it on the Loop.

The defendant City first announced the design of the Master Expressway Plan to the public in June, 1957. On July 26th of that year its Board of Commissioners passed Resolution No. 2009 enlarging said City's "Master Street Plan." Although we have not

been favored with a copy of this Resolution, it apparently approved proposed street changes that would be compatible with, or facilitate, construction and operation of the above mentioned Master Expressway Plan.

Thereafter, the City enacted its Ordinance No. 8283, which "established as limited access facilities" all streets and avenues included in the previous Resolution's extension of the Master Street Plan.

It appears to be conceded that the Master Expressway Plan contemplates the re-alignment, enlargement, and re-location of Riverside Drive through plaintiff's property. The petition also alleges that by passing its Resolution No. 2009, supra, after receiving a letter in July, 1957, from the Tulsa Metropolitan Area Planning Commission, recommending the Master Expressway Plan, Tulsa's Board of City Commissioners "adopted said Master Plan."

It is the defendant's failure to institute condemnation proceedings to take plaintiff's property during the approximately ten-year period following the aforementioned events of 1957 that forms the gravamen of the complaints set forth in the petition plaintiff filed in this action in 1967. Concerning this, the petition alleges, in substance, that plaintiff's sole economic benefit from this unimproved eight acres on Riverside Drive depends upon said property's potential for com-

mercial development, but that, by indicating that the property will be condemned at some indefinite future time in order to convert Riverside Drive into an expressway for incorporation into the planned Master Expressway system, the defendant City has precluded plaintiff from making "any economically prudent, productive, use" of said property. Plaintiff's petition says that by its "retention" of the Master Expressway Plan "without implementation" for such "unreasonable length of time, the defendant City . . . has 'frozen' " the property in a state of economic unproductivity and condemnation-related "blight" which the plaintiff characterizes as an interference with its "beneficial use" and with plaintiff's "power of disposition" of the property, constituting a "taking without just compensation," contrary to the Oklahoma Constitution's Article 2, § 24, and to the 5th and 14th Amendments to the United States Constitution.

While plaintiff's petition, as amended, presents facts which bear little similarity to those of any case that has yet been before this Court, we are not without precedent for determining the legal question hereinbefore set forth. And, on the basis of said precedent, we think the damages plaintiff has alleged can only be regarded as "consequential" and not recoverable in an inverse condemnation proceeding in view of this Court's long established construction of Article 2, § 24,

supra. As early as 1911, this Court, in determining the character of a property owner's rights that must be disturbed before he is entitled to compensation therefor in a condemnation proceeding, in Overholser v. Oklahoma Interurban Traction Co., 29 Okl. 571, 119 P. 127, quoted Edwards v. Thrash, 26 Okl. 472, 109 P. 832, 138 Am.St.Rep. 975, in part as follows:

> "Whilst the first clause of section 24, art. 2, supra, provides that private property shall not be taken or damaged without just compensation, an accompanying clause in the same section provides that, *until* compensation shall be paid to the owner or into court for the owner, *the property of the owner shall not be disturbed or the proprietary rights of the owner divested.* Does this latter clause require compensation to be paid to the owner, or into court for the owner, where the damages are merely consequential? The word 'disturb,' according to Mr. Webster, means, 'to interrupt a settled state of,' and according to the same authority 'proprietary' means 'belonging or pertaining to a proprietor, consisted as property, owned,' and the words 'the property shall not be disturbed or the proprietary rights of the owner divested' *seem to mean possession thereof shall not be taken, nor the title thereof be divested,* until compensation therefor has been first paid to the owner, or into the court for the owner. This was the controlling construction of the state of Missouri at the time of the adoption of this clause in the Oklahoma Constitution, and, when there was no such provision in force in any other state, where a contrary construction prevailed, that of the highest court of Missouri should be

especially persuasive." [Emphasis added.]

After noting that the courts seem to hold that under their State Constitutions consequential damages are recoverable, the Court in the Thrash case continued:

> " • • • The first Legislature of the state after its erection passed an act entitled 'An act amending section 28 of article 9 of chapter 17, of the Statutes of Oklahoma, 1893, and regulating the method of procedure in the condemnation of private property for both public and private use.' Neither the eminent domain act as brought over from the territory of Oklahoma, nor as thus amended, provides for the assessment of consequential damages in the case of public improvements made by a municipality. This evident legislative construction of section 24 of article 2 accords with that placed on similar provision of the Missouri Constitution by the Supreme Court of the state. Consequential damages would be difficult to ascertain before the improvements had been made. This is one of the reasons given by many of the courts as to why it was not intended by the Constitution and statute makers that provisions, providing for compensation *first* to *be made* for the taking or damaging of property by virtue of eminent domain proceedings, did not include consequential damages, and we *agree with the Supreme Court of Missouri,* in Clemens v. Insurance Company, supra [184 Mo. 46, 82 S.W. 1, 67 L.R.A. 362, 105 Am.St.Rep. 526], *in holding that, where the property of the citizen is not taken and his proprietary right not disturbed, but the damage to his property is purely consequential, he is not entitled to have same ascer-*

tained and paid before the proposed public work is done, * * *." [Emphasis added.]

See also Oklahoma Turnpike Authority v. Dye, 208 Okl. 396, 399, 256 P.2d 438, 441, 442. There is no material difference in the character of the items of damages claimed under plaintiff's first alleged cause of action in this case and some of those claimed in State of Missouri ex rel City of St. Louis v. Beck, 333 Mo. 1118, 63 S.W.2d 814, 92 A.L.R. 373, in which the Missouri Supreme Court [consistent with its early decisions cited in this Court's Thrash case] held that such damage is "of a personal character, as distinguished from any damage to the property itself, and is not an element to be considered by the Commissioners in assessing benefits and damages" in condemnation proceedings. In a much more recent case, the Missouri Court, while recognizing that the "taking or damaging" of property in the constitutional sense does not necessarily involve an actual physical taking of any part thereof, affirmed the trial court's judgment dismissing the plaintiff's action, after citing with approval cases in which governmental units with power of condemnation had gone further in committing themselves to the condemnation of the property involved than has the defendant in this case. See Hamer v. State Highway Commission [Mo.], 304 S.W.2d 869. [Cases from other jurisdictions will also be found in the footnotes to 26 Am.Jur., Eminent

Domain, §§ 168-170, and the annotation at 37 A.L.R.3d 127.]

The Court of Appeals appears to have been influenced in its decision by the theory of "de facto taking" referred to in In Re Philadelphia Parkway [Pa.], 95 Atl. 429, Miller v. City of Beaver Falls [Pa.], 82 A.2d 34, and an opinion of one appellate division of the New York Supreme Court in the [direct] condemnation case of City of Buffalo v. J. W. Clement Company, 34 A.D.2d 24, 311 N.Y.S.2d 98. When the latter case was appealed to New York's Court of Appeals in City of Buffalo v. J. W. Clement Company, 28 N.Y.2d 241, 321 N.Y.S.2d 345, that Court disagreed with the New York Supreme Court and set aside said lower court's award of damages, after distinguishing between "de facto taking" and "condemnation blight," and finding that the facts failed to disclose any act on the part of the city "which could possibly be construed as an assertion of dominion and control." This latter opinion is in accord with recent decisions, not only in New York [see 76 Crown Street Corporation v. City of New York, 35 A.D.2d 1005, 317 N.Y.S. 2d 987], but also in other States. See Cayon v. City of Chicopee [Mass.], 277 N.E.2d 116, and Conroy-Prugh Glass Co. v. Commonwealth, Dept. of Tr. [Pa.], 298 A.2d 672. In support of its claim of compensable taking or damage, plaintiff points to a letter that the Director of this State's De-

partment of Highways wrote to Tulsa's City Engineer as late as November, 1962, pointing out that all of plaintiff's property would be necessary for construction of the Riverside Drive Expressway project and advising that the defendant City should take whatever action necessary to protect the planning for the Expressway. However, it does not appear that, after this advice or suggestion, the City ever did anything, by way of overt action, to insure that plaintiff's property would be available for the planning or future construction of the Riverside Drive Expressway or for carrying out the Master Expressway Plan. More to the point, defendant did nothing to restrict plaintiff's power of dominion or control over the property.

In urging a decision in this case consistent with Miller and Philadelphia Parkway, supra [which latter decision Miller approvingly referred to], plaintiff's counsel points out certain already completed construction projects included in the aforementioned Master Expressway Plan, at least one of which they relate to Riverside Drive's conversion to an expressway, as unequivocal acts of the defendant City showing the kind of de facto taking that was adjudged in those cases. Defense counsel counters by saying that these completed features of the Master Expressway Plan and Tulsa's Master Street Plan were needed improvements and will be used independently of the Riverside Drive

Expressway, and regardless of whether it is ever constructed or not. It is said that this distinguishes this case from the Miller and Philadelphia Parkway cases in that completion of these projects does not commit the City to carrying out the Master Expressway Plan.

In view of what was said concerning our Constitution's Article 2 § 24, and condemnation statutes in the early Oklahoma cases hereinbefore cited, we find it unnecessary to compare the facts of this case with those cases in other jurisdictions which are claimed to be incompatible with the decision of the trial court. [In this connection, notice In Re Crosstown Expressway (Pa.), 281 A.2d 909, applying Pennsylvania's Eminent Domain Code..] We think it is sufficient to say that, on the basis of Oklahoma decisions, plaintiff's petition, as amended, does not set forth facts sufficient to state a cause of action in inverse condemnation for the taking or damaging of its property under the Oklahoma Constitution and statutes, nor under the United States Constitution. [In the latter connection, see the discussion and cases cited in Southern Kansas Ry. Co. v. Oklahoma City, 12 Okl. 82, 99-108, 69 P. 1050, 1056-1057, Sester v. Belvue Drainage Dist., 162 Kan. 1, 173 P.2d 619, and other cases cited in the footnotes to 26 Am.Jur.2d, Eminent Domain, §§ 157 and 170.] And we so hold. [We need not decide what might have been the elements of plaintiff's damages if the defendant City had

already exercised its right of eminent domain as to plaintiff's property, but see City of Tulsa v. Horwitz, 131 Okl. 63, 267 P. 852 (4th syll.), and other cases cited in State Ex. Rel. Department of Highways v. Robb, Okl., 454 P.2d 313.] Thus, we reverse the decision of the Court of Appeals as to plaintiff's first cause of action.

We find no error in that decision as to plaintiff's second alleged cause of action. For the reasons above stated, plaintiff's petition for certiorari is granted; the decision of the Court of Appeals is affirmed in part and reversed in part; and the judgment of the District Court is affirmed.

DAVISON, C.J., WILLIAMS, V.C.J., and IRWIN, BERRY, HODGES, LAVENDER, JJ., and BLISS, S.J., concur.

Under Art. 7, § 4, of the Oklahoma Constitution, The Honorable C. F. Bliss, Jr., was temporarily assigned to act as a Special Justice instead of The Honorable Robert D. Simms, who became a regular Justice of this Court subsequent to the filing of this appeal.

APPENDIX B

IN THE COURT OF APPEALS OF
THE STATE OF OKLAHOMA
(Division No. 1)

No. 45,200

EMPIRE CONSTRUCTION, INC.,
an Oklahoma Corporation,
Appellant

vs.

THE CITY OF TULSA, OKLAHOMA,
a Municipal Corporation
Appellee

APPEAL FROM THE DISTRICT COURT OF
TULSA COUNTY, OKLAHOMA
HONORABLE ROBERT D. SIMMS, JUDGE

REVERSED AND REMANDED

Houston, Davidson, Jacoby,
Sonberg, Main & Nelson
By: R. L. Davidson, Jr.
John E. Robertson
Tulsa, Oklahoma, For Appellant,

Waldo F. Bales,
City Attorney
David Nelson,
Samuel C. Stone,
Assistant City Attorneys
Tulsa, Oklahoma, For Appellee.

ROMANG, J.:

Plaintiff, Empire Construction, Inc., filed its petition herein setting out two causes of action. The first cause of

action is for inverse condemnation resulting from an alleged indirect taking with no allocation of damages, and for appointment of appraisers to determine the value of the property taken. The second cause of action is for damages based upon alleged slander of title. Plaintiff filed two amendments to its original petition.

Defendant, City of Tulsa, Oklahoma, filed a special demurrer to each alleged cause of action and a general demurrer to plaintiff's petition. The demurrers were based on the grounds that the allegations in the petition "do not state facts sufficient to constitute a cause of action in favor of the plaintiff and against the defendant."

The trial court sustained said demurrers to the petition and entered judgment for the defendant City. Empire has appealed.

The rule in passing on demurrers to a petition is set out in the court syllabus of McKenzie v. Feldman, 434 P.2d 884 (Okl. 1967) as follows:

> "As against a demurrer, a petition must be liberally construed and all of its allegations of fact must be taken as true, together with all reasonable inferences therefrom. If any fact stated therein entitled plaintiff to any relief, the demurrer should be overruled."

Plaintiff alleges in its first cause of action that it owns approximately eight (8) acres of unimproved land located on Riverside Drive at East 31st Street in Tulsa, Oklahoma;

that said land is "ideally suited for substantial income-producing development"; that on or about June 25, 1957 the City announced a Master Expressway Plan providing for the realignment, enlargement and relocation of Riverside Drive through all of plaintiff's said real property, making thereof a limited access expressway; that said Plan was announced and publicized to the general public by means of various reports appearing in the principal Tulsa newspapers; that on July 26, 1957, the Board of City Commissioners passed a Resolution adopting said Master Expressway Plan; that said Plan has continued since 1957 to the present, but no steps have been taken to acquire plaintiff's property or to initiate the construction of said Riverside Expressway; and plaintiff further alleges as follows:

> "Publication of said Expressway Plan, its adoption, publicity and retention without implementation for an unreasonable length of time have effectively deprived the plaintiff of any beneficial use of said real property in the following particulars:
>
> "(a) As vacant land, the sole economic benefit of said real property depends upon its potential for development and financing. Said potential, although high prior to the announcement of the Expressway Plan, has been, by the Plan and utterance of responsible officials of defendant, reduced to insignificance.
>
> "(b) The prospective condemnation at an indefinite future time, as implied by the said publication, adoption and declarations concerning the Plan has rendered plaintiff's land virtually unmarketable, not-

withstanding diligent efforts of the plaintiff to sell or improve the same.

"(c) The promise of condemnation at an indefinite future time, as implied by the said publication, adoption, and publicity of the Plan, has prohibited the plaintiff from devoting said real property to any economically prudent, productive, use.

"VIII.

By its publication, adoption and publicly announced intention to acquire for said Expressway Plan, and further by its retention of the Plan without implementation for an unreasonable length of time, the defendant City of Tulsa has 'frozen' plaintiff's said real property in a state of economic unproductivity, has substantially interfered with plaintiff's power of disposition, and has thwarted its use for any reasonable purpose; in sum, creating a condition of 'pre-condemnation blight'. On the other hand, the defendant City of Tulsa has neither paid any compensation to the plaintiff nor relieved the plaintiff of its burden of taxation.

"IX.

Said 'freezing' or restriction of said real property has substantially interfered with the plaintiff's beneficial use thereof and constitutes a taking without just compensation, contrary to the Oklahoma Constitution, Article 2, Section 24, and to the United States Constitution, Articles 5 and 14."

The Oklahoma Constitution, Article II, Section 24, provides in part as follows:

"Private property shall not be taken or damaged for public use without just compensation. . . . . "

Our research fails to reveal any Oklahoma case

wherein the threat of condemnation has frozen property values or created a "pre-condemnation blight" for a long period of time such as in the present case where the alleged "freeze" has now been in effect for a period of more than 15 years.

In 26 Am.Jur.2d, § 169, pp. 843-844, we find the following:

> "It is the general rule that a mere plotting or planning in anticipation of a public improvement is not a taking or damaging of the property affected. Thus, the recording of a map showing proposed highways, without any provision for compensation to the landowners until future proceedings of condemnation are taken to obtain the land, does not constitute a taking of the land, or interfere with the owner's use and enjoyment thereof. Economic effect on land use caused by an official highway proposal is held not compensable. No damages are collectible until the actual taking of the land. When the appropriation takes place, any impairment of value from such preliminary steps becomes merged, it is said, in the damages then payable. In exceptional circumstances, however, as where a city does some unequivocal act evidencing an intention to open a proposed street, parkway, or other contemplated improvement, or where the prohibitory provisions of an ordinance or statute are such as actually to interfere with an owner's use of his property, it is held that the acts amount to a taking in the constitutional sense.

The City of Tulsa cites the case of City of Buffalo v. J. W. Clement Co., 311 N.Y.S.2d 98 (N.Y. 1970), and states:

". . . . . if the City of Buffalo had not filed the condemnation suit, Clement would not have been entitled to a judgment even though he had incurred 'damages' as a result of the precondemnation notices."

We note in the Buffalo opinion the following:

"The question presented by this appeal is whether there can be a *de facto* taking absent a physical invasion or direct legal restraint.

"There are few cases dealing with this precise question. Clearly there has been a reluctance to come to grips with it, presumably because of the potential for increased costs of public condemnations if the principle of *de facto* taking be adopted without limitation. It appears that until recent condemnations of wholesale character were undertaken, the problem was not of serious proportion. Where under new practice a serious injustice is shown to have resulted in some instance, the courts should not hesitate to act in a traditional manner to afford relief.

* * * * *

"In other jurisdictions courts have recognized that announcements of impending condemnations coupled with substantial delay and damage so deprived an owner of his substantial use of property that a *de facto* taking had occurred.

* * * * *

"There is to be noted a marked distinction between (1) those cases which by reason of the cloud of condemnation, resulting in so-called condemnation blight, permit the claimant to establish his true damage for the *de jure* taking by proving its value at

an earlier time before the debilitating threat of condemnation (see State Road Department v. Chicone, 158 So.2d 753, 758 [Fla. 1963]) has depressed its value (citations omitted), and (2) those cases which go to the extent of declaring that the acts of the condemnor constitute a *de facto* taking long before the *de jure* taking. The application of such principles must depend not only upon the acts of the condemnor but upon the effect upon the condemnee, and the court must be guided by the further principle that its object is to achieve substantial justice between the condemning public and the private owner."

In the case of In Re Philadelphia Parkway, 95 Atl. 429 (Pa. 1915), the appellant owned a lot within the lines of a proposed parkway. In 1903 an ordinance was passed to place the parkway upon the city plan. By condemnation and purchase the City acquired title to various properties within the plan. The City delayed acquisition of appellant's property. Appellant filed a petition asking for the appointment of viewers to assess damages. The City moved to quash on the ground that until an ordinance was passed to open, there was no taking within the meaning of the law. The trial court sustained the motion to quash, and the Pennsylvania Supreme Court reversed, holding:

"The construction of a parkway is not an ordinary or usual undertaking on the part of the city; it is unusual and extraordinary.

• • • • •

" . . . . . As to ordinary cases relating to laying out, opening, widening, extending, and grading streets, lanes, and alleys, the settled rule relied on by the city as to the time of the taking and as to when the trespass, if any, was committed, still remains in full force and effect.

"It now remains to be determined how much of what has been said applies to the facts of the present case. The construction of the parkway is not an ordinary or usual undertaking on the part of the city; it is unusual and extraordinary. This great boulevard is not intended for the ordinary purposes of commercial travel. Its purpose is to add charm and beauty to the city and to give pleasure to its population. It is a defined public way within specified and limited boundaries. It cannot serve the purpose for which it was intended until completed.

* * * * *

"The city has committed itself to this improvement by its acts just as much as if councils had declared their intention by passing an ordinance to open. The law looks to the substance, and not to the form. It is futile to argue that councils have not committed the city to the opening when they have already appropriated millions of dollars for this purpose. We consider what has been done as the equivalent of notice to the property owners that their lands would be appropriated for parkway purposes and that their possession was about to be disturbed.

"Now, a word as to the situation of abutting owners whose properties are affected by the proposed improvement. The municipal arm of the city has lain upon all properties within the lines of the parkway,

with such restrictions and limitations as are implied thereby, for a period of about 12 years. New buildings cannot be erected, nor can valuable improvements be made, without risk of loss. Rental values have been depreciated and general market values seriously affected. Certainly this condition of affairs should not be permitted to continue indefinitely without redress to property owners who are injured thereby. More especially is this true when the Constitution guarantees to the private owner 'just compensation' for property so 'taken, injured or destroyed.' The facts show that appellant has suffered grievous injury and should be compensated. If so, why not now? The only answer is that the city has not formally ordered the opening, and therefore there has been no taking within the meaning of the law. Our reply has already been indicated. What the city has done is equivalent to notice that the parkway will be opened and completed and that the lands required for this purpose will be appropriated under the power of eminent domain unless otherwise acquired. Indeed, as we view it, the city has committed itself to the opening by a series of acts more expressive of its fixed purpose than could be indicated by a resolution to open without anything more. Our conclusion is that under the facts of this case the property of the appellant has been injured, and what the city has done constitutes a taking in the constitutional sense."

The City of Tulsa says that the Philadelphia case is distinguishable because the highway system was partially completed while "In the case at bar, the final plans for Riverside Expressway have not been completed nor

has the property been purchased so as to commit the City to a precise location." In this regard Empire's petition states:

> "Throughout the same period of time (ever since June 25, 1957) the defendant City of Tulsa has failed or refused to cancel or officially withdraw said plan or to divert the course of said Expressway from plaintiff's land."

Empire's first amendment to its petition reads as follows:

> "By a letter addressed to the City Engineer of the City of Tulsa, the Department of Highways of the State of Oklahoma referred specifically to the above described real property ("Layman property") and directed the defendant City of Tulsa to "take whatever action is necessary to protect the planning for the expressway." Said letter further advised the defendant City that "the entire Layman property will be required for the construction."

Empire's second amendment to its petition reads as follows:

> "By Ordinance No. 8283 the defendant City of Tulsa established as limited access facilities within the corporate limits of the City of Tulsa all streets and avenues (including the said Riverside Expressway) included in the extention of the Master Street Plan enacted by the Resolution referred to in Paragraph V.
>
> "By written agreement with the State Highway Commission of the State of Oklahoma, dated August 1, 1961, the defendant City of Tulsa recognized the

need for and adopted a policy of making advance payments to the owners of property in the path of the Crosstown Expressway, a part of the said Master Expressway Plan which includes the said Riverside Expressway."

In Miller v. City of Beaver Falls, 82 A.2d 34 (Pa. 1951) the court held that tying up private property for three years for a park was an injustice that must be apparent to every one. In the opinion the court said:

> "The action of the City of Beaver Falls in plotting this ground for a park or playground and freezing it for three years is, in reality, a taking of property by possibility, contingency, blockage and subterfuge, in violation of the clear mandate of our Constitution that property cannot be taken or injured or applied to public use without just compensation having been first made and secured. The contention of the City in this case, if adopted, would make a travesty of the constitutional provisions protecting rights of property."

In Miller the court quoted 20 C.J. 666 as follows:

> "There need not be an actual, physical taking, but any destruction, restriction or interruption of the common and necessary use and enjoyment of property in a lawful manner may constitute a taking for which compensation must be made to the owner of the property."

In Henthorn v. Oklahoma City, 453 P.2d 1013 (Okl. 1969), the court syllabus holds:

> "1. There can be a taking of private property

by flights over or in close proximity to land when such flights are continuous, frequent and low enough to constitute a substantial interference with the use and enjoyment of the property.

"2. Ordinarily, the question of whether a continuing interference is substantial enough to consti tute a 'taking' under Section 24, Art. 2, Constitution, is one for the jury."

In the Henthorn opinion the court said:

"It is generally conceded that there is a legal right to the use and enjoyment of one's property free from unreasonable interference. The ultimate question is whether there is a sufficient interference with the landowner's use and enjoyment to constitute a taking by a sovereign.

* * * * *

". . . . . the legal right to be protected is the use and enjoyment of property without substantia interference by the sovereign."

We find and hold that the construction of an expressway such as shown by the plan in the instant case, is not an ordinary or usual undertaking on the part of the City; it is unusual and extra-ordinary.

According to Empire's petition, its property has been tied up through threat of condemnation ever since June, 1957, which, if proven at trial, constitutes an unreasonable length of time. Since the allegations of the petition must be taken as true in passing on demurrers thereto, we find and hold that the trial court erred in sustaining the City's

demurrers to Empire's first cause of action.

Empire's alternative second cause of action for slander of title, is based mainly upon the City's long delay in initiating condemnation proceedings. We have examined Empire's allegations with reference thereto, and conclude that the demurrers were properly sustained to Empire's alleged second cause of action.

The judgment sustaining the demurrers to Empire's first cause of action is hereby reversed and this case is remanded for trial on said cause of action.

REVERSED AND REMANDED.

BAILEY, P.J. and BOX, J. concur.

APPENDIX C

IN THE DISTRICT COURT IN AND FOR TULSA COUNTY

STATE OF OKLAHOMA

No. 115765

EMPIRE CONSTRUCTION, INC.,
an Oklahoma corporation,

Plaintiff,

-vs-

THE CITY OF TULSA, OKLAHOMA,
a municipal corporation,

Defendant.

JOURNAL ENTRY OF JUDGMENT

NOW, on this 27th day of August, 1971, the above-styled cause came on for hearing; Plaintiff being represented by its counsel of record, Houston, Klein & Davidson, by and through R. L. Davidson, Jr., and the Defendant being represented by its counsel of record, Samuel C. Stone, Assistant City Attorney.

The hearing was held to consider the Motions heretofore filed by the Defendant, City of Tulsa, Oklahoma, those being: Motion to Strike, Special Demurrer to First Cause of Action of Plaintiff's Petition, Special Demurrer to Second Cause of Action of Plaintiff's Petition, and General Demurrer, and the Petition and Amendment to Petition filed by the Plaintiff, Empire Construction, Inc.

The Court, having heard the testimony and arguments of counsel, and being fully advised, finds that the Special Demurrer to First Cause of Action of Plaintiff's Petition, Special Demurrer to Second Cause of Action of Plaintiff's Petition, and General Demurrer, filed by the Defendant, City of Tulsa, should be and the same are hereby sustained, and the Plaintiff granted an exception to the Court's ruling.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Special Demurrer to First Cause of Action of Plaintiff's Petition, Special Demurrer to Second Cause of Action of Plaintiff's Petition, and General Demurrer, filed by the Defendant City of Tulsa, should be and the same are hereby sustained and the Plaintiff granted an exception to the Court's ruling.

ROBERT D. SIMMS

DISTRICT JUDGE

APPROVED AS TO FORM:

HOUSTON, KLEIN & DAVIDSON

By /s/ R. L. Davidson, Jr.
R. L. Davidson, Jr.,
Attorney for Plaintiff

By /s/ Samuel C. Stone
Samuel C. Stone, Assistant City
Attorney, Attorney for Defendant

APPENDIX D

RESOLUTION

ADOPTING A TULSA METROPOLITAN AREA EXPRESSWAY PLAN AS PART OF THE TULSA METROPOLITAN AREA THOROFARE PLAN, AUTHORIZING AND DIRECTING SUBMISSION THEREOF TO THE CITY OF TULSA AND TULSA COUNTY BOARDS OF COMMISSIONERS FOR THEIR INFORMATION AND AUTHORIZING AND DIRECTING THE PROPER FILING THEREOF

WHEREAS, The Tulsa Metropolitan Area Planning Commission entered into a Cooperative Expressway Planning Program by agreement with the Oklahoma State Department of Highways on January 15, 1957, for the purpose of preparing a thorofare plan with particular emphasis on location and capacities of and access to expressways within the jurisdiction of the Planning Commission and the City of Sand Springs, and

WHEREAS, Said studies have culminated in the preparation of a proposed expressway system plan attached hereto and made a part hereof as Exhibit "G", and

WHEREAS, The Tulsa Metropolitan Area Planning Commission is required to make and adopt an official Master Plan of the area, as provided in Section 863.7, Title 19, Oklahoma Statutes, and

WHEREAS, It is deemed necessary, desirable and in the public interest that said Tulsa Metropolitan Area Expressway System which shows the general location

of proposed expressways, be adopted as part of the Official Master Plan of the Tulsa Metropolitan Area, and

WHEREAS, The Tulsa Metropolitan Area Planning Commission did by resolution on the 3rd day of July, 1957, call a public hearing for the 24th day of July, 1957, and duly gave public notice thereof for the purpose of considering the adoption of the Tulsa Metropolitan Area Expressway System Plan as part of the Official Master Plan of the Tulsa Metropolitan Area, and

WHEREAS, Said public hearing was held this 24th day of July, 1957, and

WHEREAS, After due study and deliberation it is deemed advisable and in keeping with the purposes of the Planning Commission as set forth in Section 863.7, Title 19, Oklahoma Statutes to adopt said Expressway System.

NOW, THEREFORE, BE IT RESOLVED That said Tulsa Metropolitan Area Expressway System as presented at said public hearing, a true and correct copy thereof entitled "EXPRESSWAY SYSTEM a Part of the Official Master Plan" bearing the date of June 28, 1957 being attached hereto as Exhibit "G", and made a part hereof, be and the same is hereby adopted as a part of the Official Master Plan of the Tulsa Metropolitan Area; and

BE IT FURTHER RESOLVED That the Chairman, or in his absence the Vice Chairman, be and is hereby authorized and directed to submit forthwith said amendment to the Board of Commissioners of the City of Tulsa and to the Board of County Commissioners of Tulsa County, for their approval as provided by law.

APPROVED AND ADOPTED This 24 day of July, 1957, by a majority of the full membership of said Commission including its ex officio members, as provided by law.

/s/ Ed Lubie
Chairman

Attest: /s/ D. E. Martin
Secretary

APPROVED BY THE BOARD OF COMMISSIONERS OF THE CITY OF TULSA, OKLAHOMA, this 26th day of July, 1957;

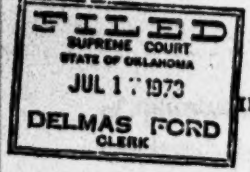
Attest: _____
City Auditor Mayor

Approved as to form: _____
Asst. City Attorney

APPROVED BY THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF TULSA, OKLAHOMA, this 25th day of July, 1957:

Attest: _____
County Clerk Chairman

Approved as to form: _____
Asst. County Attorney



APPENDIX E

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

Tuesday, July 17, 1973

THE CLERK IS DIRECTED TO ISSUE THE FOLLOWING ORDERS:

44,680 In Matter of Application of Reed, etc. v. Luker, et al. and City of Sapulpa.
Certiorari denied.

44,897 Helen Martin v. Jack Reid Martin.
Rehearing denied.

45,117 City of Norman v. Person E. Woodall & Syla Woodall.
Certiorari denied.

45,200 Empire Construction, Inc. v. City of Tulsa.
Rehearing denied.

45,305 Ella Mae Tindle v. W. W. Linville and Lula Linville, his wife.
Motion for Oral Argument and Petition for Rehearing denied.

45,648 Oklahoma Natural Gas Company, a corporation, and Max L. Knotts v. Crystal Gas Company, a corporation.
Appellants granted until August 16, 1973 to file reply brief.

45,793 Don Brown v. Stable Corporation.
Appellee granted until August 6, 1973 to file brief.

45,936 William Everett Lee, Jr., individually, d/b/a Lee's Real Estate v. Maxine Irby.
Certiorari denied.

45,955 Ellis Morris, et al. v. Waukomis State Bank, et al.
Appeal dismissed.

45,964 Clark L. Curry, Janis K. Curry v. The City of Oklahoma City, a Municipal Corp., et al.
Appellants granted until July 30, 1973 to file reply brief.

45,969 Board of County Commissioners of Harmon County v. Vernon K. Peters and Shirley Peters Henard.
Certiorari denied.

46,028 Ophelia Williams v. Thomas Williams.
Appellant granted until August 20, 1973 to file brief. No further extension contemplated.

46,008 Lillian M. Harting, Administratrix of the Estate of Kenneth M. Harting Deceased v. Benham Engineering Company and Affiliates, a co-partnership composed of David B. Benham, John F. Benham and Margaret L. Benham.
Appellees granted until August 22, 1973 to file brief.

46,022 Thomas Chapman, Jr., an individual for himself and all other members of the Pawnee Indian Tribe of Oklahoma and the Pawnee Indian Tribe of Okla., a corp. v. Owen Echohawk, et al.
Appellants granted until August 15, 1973 to file brief. No further extension contemplated.

46,054 Doris Allen v. Chrysler Credit Corporation, et al.
Appellees granted until August 14, 1973 to file brief.

46,142 Leona Gustin and Jesse James Gustin v. Arthur Floyd Meadows.
Appellants granted until August 16, 1973 to file brief.

46,159 J. C. Murray v. D C. Vandevander, et al.
Appellant granted until August 1, 1973 to file brief.

APPENDIX F

IN THE DISTRICT COURT WITHIN AND FOR
TULSA COUNTY
STATE OF OKLAHOMA

No. _____

EMPIRE CONSTRUCTION, INC.,
an Oklahoma corporation,

Plaintiff,

vs.

THE CITY OF TULSA, a
municipal corporation,

Defendant

PETITION

FIRST CAUSE OF ACTION

Comes now the plaintiff, Empire Construction, Inc., and for its first cause of action against the defendant alleges and states:

I.

The defendant City of Tulsa, Oklahoma, is a municipal corporation duly organized and existing under the laws of the State of Oklahoma, located in Tulsa County, and possessing the right and power to acquire land by condemnation under the laws of eminent domain of the State of Oklahoma. Said defendant may be served with process by serving James M. Hewgley, Jr., its duly elected and qualified Mayor, and by serving William F. Lambert, its duly elected and qualified Auditor.

II.

The plaintiff Empire Construction, Inc., is an Oklahoma corporation, with its principal place of business in Tulsa County, Oklahoma.

III.

At all times material to this action plaintiff was and still is owner of certain real estate located on Riverside Drive at East 31 Street in Tulsa, Oklahoma, more particularly described as follows:

> All that part of Lot 7 in Section 13, Township 19 North, Range 12 East of the Indian Base and Meridian, Tulsa County, Oklahoma, lying South of the Midland Valley Railway Company right-of-way and East of the Easterly right-of-way line of Riverside Drive, according to the Government Survey thereof.

Said real property is vacant, it contains approximately eight (8) acres, together with riparian rights to the thread of the Arkansas River and is, by location and size, ideally suited for substantial income-producing development. At the time of the expropriation described hereinafter, the fair market value of said land was and is in excess of $275,000.00.

IV.

On or about June 25, 1957, the defendant City of Tulsa announced a Master Expressway Plan providing for the realignment, enlargement, relocation and con-

version of Riverside Drive through all of plaintiff's said real property, making thereof a limited access expressway. Copies of the relevant pages of said Master Plan, showing the projected path of Riverside Drive, are hereto annexed as *Exhibits A,B,* and *C.* Further, the said Master Expressway Plan was announced and publicized to the general public by means of various reports appearing in the principal Tulsa newspapers. A few of said reports are as follows:

(1) On or about June 2, 1957, an article entitled "Expressway System Plans Outlined", a copy of which is hereto annexed as *Exhibit D.*

(2) On or about June 26, 1957, an article entitled "Master Expressway Plan Bared", a copy of which is hereto annexed as *Exhibit E.*

(3) On or about October 18, 1957, an article entitled "Expressway Routes Listed", a copy of which is hereto annexed as *Exhibit F.*

V.

By a letter of transmittal dated July 26, 1957, copy of which is hereto annexed as *Exhibit G,* the Tulsa Metropolitan Area Planning Commission recommended to the Board of City Commissioners of the defendant City of Tulsa that said Master Expressway Plan be approved; thereafter, on July 26, 1957, a Resolution of said Board, copy of which is hereto annexed as *Exhibit H*

was filed, which Resolution adopted said Master Plan.

VI.

Said Plan, newspaper reports, and Resolution clearly showed by word and picture that the Riverside Expressway would traverse all of plaintiff's said real property. Nevertheless, the defendant City of Tulsa has wholly failed and neglected to construct said Riverside Drive Expressway or to implement said Master Expressway Plan. For a period in excess of ten years, and continuing at the present time, the projected public use of plaintiff's said real property has remained a reality but no steps have been taken to acquire plaintiff's property or to initiate the construction of said Riverside Expressway. Throughout the same period of time the defendant City of Tulsa has failed or refused to cancel or officially withdraw said plan or to divert the course of said Expressway from plaintiff's land.

VII.

Publication of said Expressway Plan, its adoption, publicity and retention without implementation for an unreasonable length of time have effectively deprived the plaintiff of any beneficial use of said real property in the following particulars:

(a) As vacant land, the sole economic benefit of said real property depends upon its potential for development and financing. Said potential, although high

prior to the announcement of the Expressway Plan, has been, by the Plan and utterance of responsible officials of defendant, reduced to insignificance.

(b) The prospective condemnation at an indefinite future time, as implied by the said publication, adoption and declarations concerning the Plan has rendered plaintiff's land virtually unmarketable, notwithstanding diligent efforts of the plaintiff to sell or improve the same.

(c) The promise of condemnation at an indefinite future time, as implied by the said publication, adoption, and publicity of the Plan, has prohibited the plaintiff from devoting said real property to any economically prudent, productive, use.

VIII.

By its publication, adoption and publicly announced intention to acquire for said Expressway Plan, and further by its retention of the Plan without implementation for an unreasonable length of time, the defendant City of Tulsa has "frozen" plaintiff's said real property in a state of economic unproductivity, has substantially interfered with plaintiff's power of disposition, and has thwarted its use for any reasonable purpose; in sum, creating a condition of "pre-condemnation blight". On the other hand, the defendant City of Tulsa has neither paid any compensation to the

plaintiff nor relieved the plaintiff of its burden of taxation.

IX.

Said "freezing" or restriction of said real property has substantially interfered with the plaintiff's beneficial use thereof and constitutes a taking without just compensation, contrary to the Oklahoma Constitution, Article 2, Section 24, and to the United States Constitution, Articles 5 and 14.

X.

The defendant City of Tulsa has wholly failed and neglected to utilize the eminent domain procedure authorized by the Constitution and Statutes of the State of Oklahoma with respect to the said real property of the plaintiff and hence has deprived the plaintiff of its constitutional and statutory rights to just compensation.

XI.

But for the wrongful acts of the defendant City of Tulsa, Plaintiff could have and now could use said property for profitable purposes.

XII.

The Court should find that the said conduct of the defendant City of Tulsa constitutes an indirect taking

of private property without compensation and should therefore initiate eminent domain proceedings by means of this inverse condemnation proceeding. The Court should appoint three disinterested freeholders at a date and time certain for the purpose of determining the value of the real estate taken and should require them to appraise the value of the said land taken and the damage done by such taking and report the same to the Court. The Court should further notify the defendant forthwith of its intention to appoint said appraisers and should thereafter render judgment for plaintiff for damages in the amount so awarded by said commissioners in condemnation, or such sum as may otherwise be lawfully determined, together with the costs of this action.

WHEREFORE, plaintiff prays an order of this Court notifying the defendant that it has been sued and setting a time and date certain for the appointment of appraisers to determine the value of the property taken; that thereafter freeholders be appointed in accordance with 66 Okl.Stat.Ann. Sec. 53, requiring the said appraisers to report to the Court as to the value of the land taken and/or damaged and that upon filing of such report the Court enter judgment in damages for the amount thereof in favor of plaintiff and against said defendant, together with the costs of this action.

SECOND CAUSE OF ACTION

Comes now the plaintiff and, in the alternative, alleges and states as its second cause of action:

I.

The plaintiff realleges each and every allegation contained in paragraphs 1 through 8 of its First Cause of Action herein.

II.

The conduct of the defendant City of Tulsa as described in paragraphs 4 through 8 of the First Cause of Action herein, and in particular the defendant's refusal for a period in excess of ten years either to retract or divert the said Expressway Plan on the one hand, or to condemn plaintiff's real property on the other, have rendered false and misleading the statements of plan and intent contained in said Master Expressway Plan and constitute implied malice toward the plaintiff. Further, said careless and grossly reckless announcements, prognostications, representations, and irresponsible declarations, made without a basis of reasonable knowledge, amount to actual malice.

III.

In addition to the conduct of the defendant City City of Tulsa as described in Paragraph 8 of the First Cause of Action herein, individual elected officials and

officers, employees and agents of the defendant City of Tulsa have affirmatively discouraged prospective purchasers of said real property and actively attempted to dissuade such purchasers from buying same, all with the unlawful and wrongful intent to depress and destroy the value of the plaintiff's property.

IV.

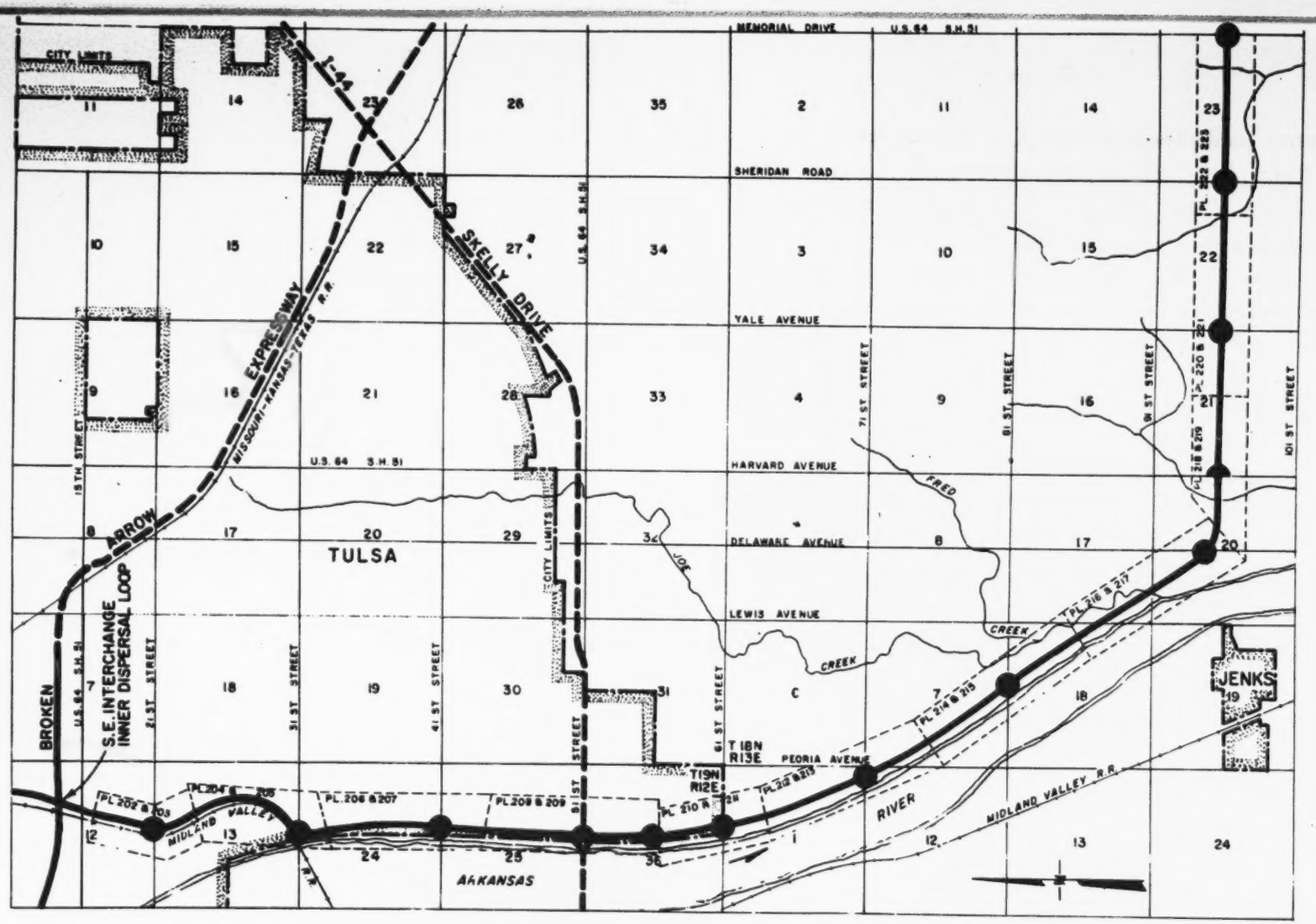
By said wrongful and malicious acts the defendant has created, fostered, maintained and burdened said real property with pre-condemnation blight, constituting slander of title, by reason whereof plaintiff has been damaged in the sum of $200,000.

WHEREFORE, plaintiff prays judgment against the defendant for $200,000.00, for interest at the rate of six per cent per annum from date of judgment, for costs of this action, and for such other relief as the Court may deem proper.

HOUSTON, KLEIN & DAVIDSON

By _____

Attorneys for Plaintiff



RIVERSIDE ROUTE

● LOCAL ROAD ACCESS POINTS

◗ LOCAL ROAD ACCESS POINTS, ONE DIRECTION ONLY

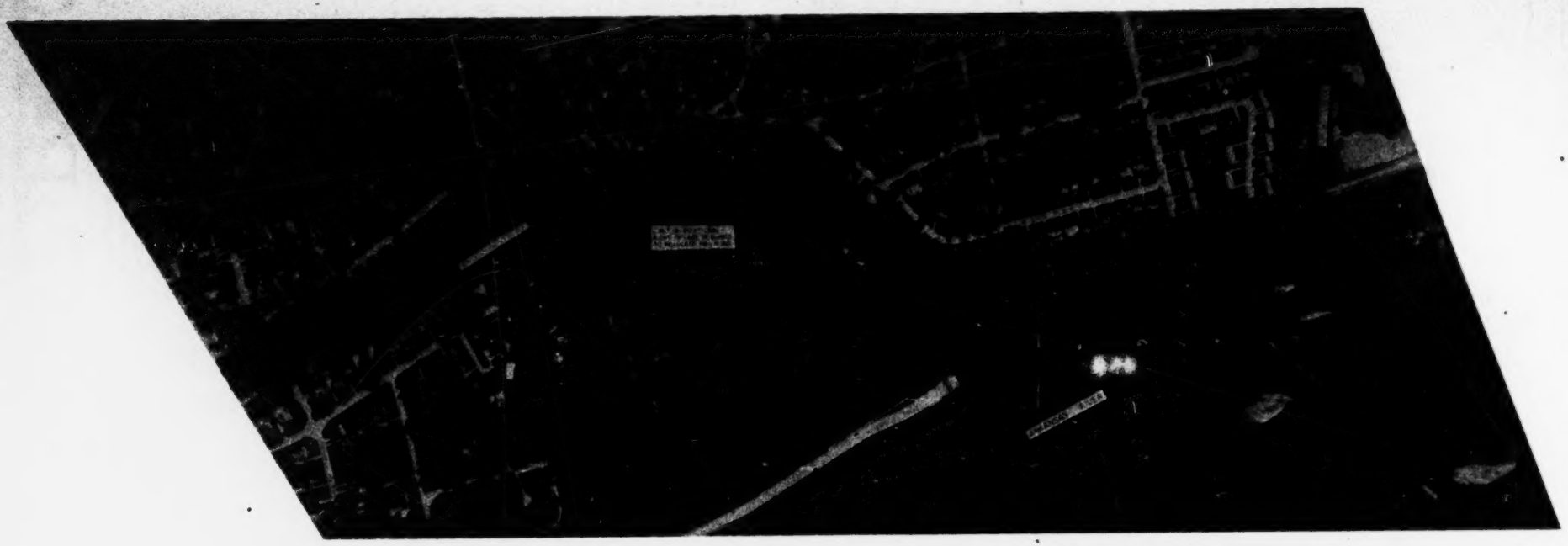
EXHIBIT A

4000 0 4000 8000

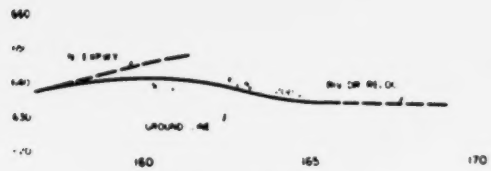
SCALE IN FEET

LENGTH OF ROUTE – 11.852 MILES

EXHIBIT B

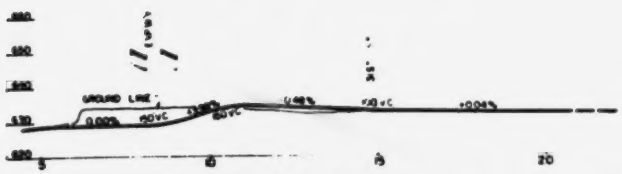


PROFILE - 26TH ST



PROFILE - RAMP D
31ST ST

PROFILE - RAMP A
31ST ST

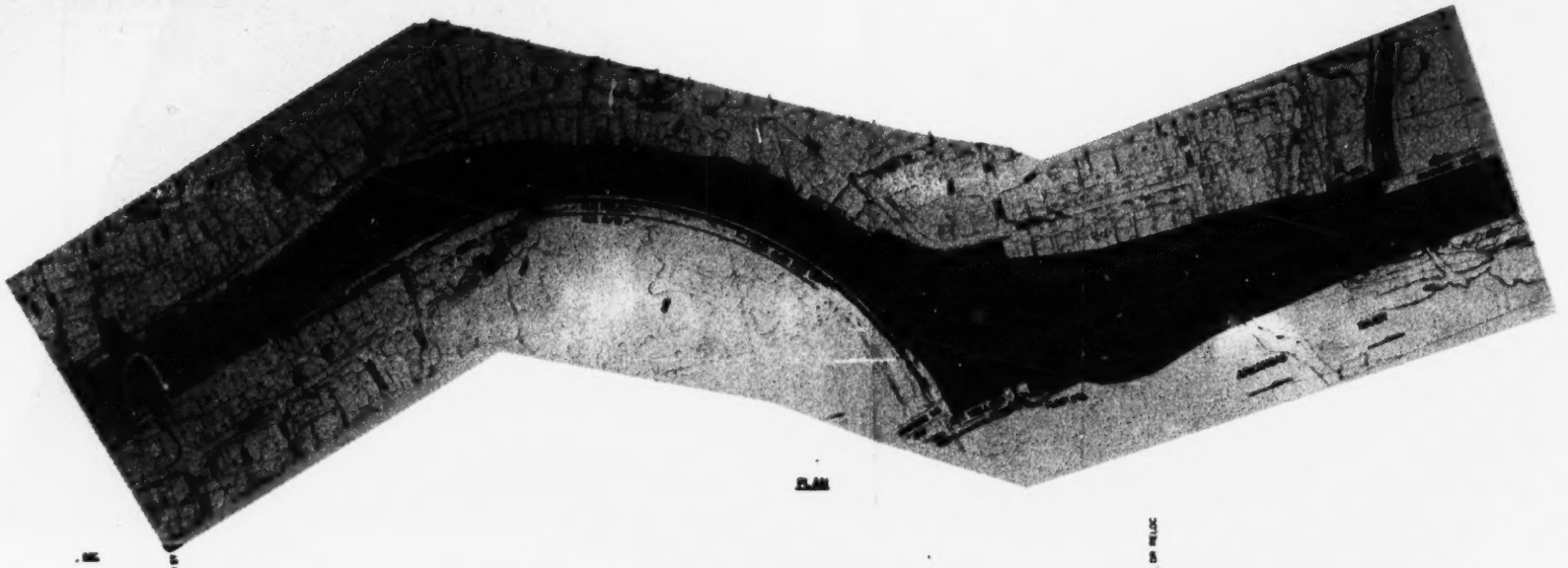


PROFILE - RIVERSIDE DRIVE RELOCATION

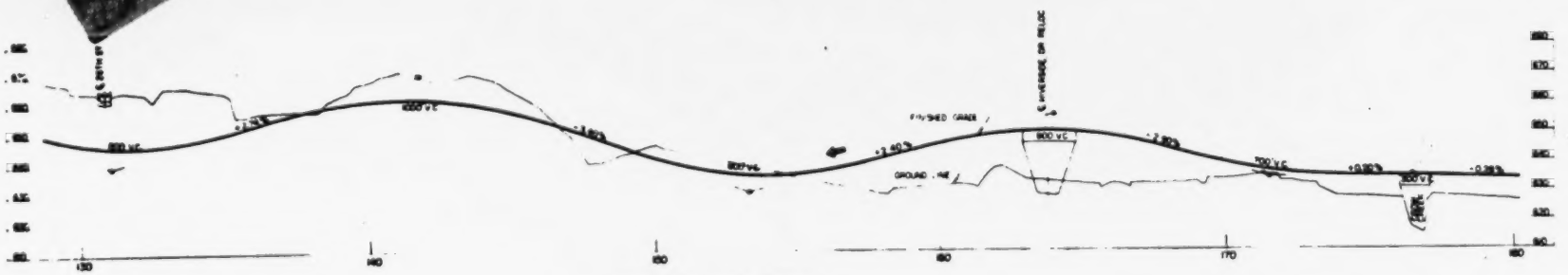
PROFILE - RAMP C
31ST ST

PROFILE - RAMP B
31ST ST

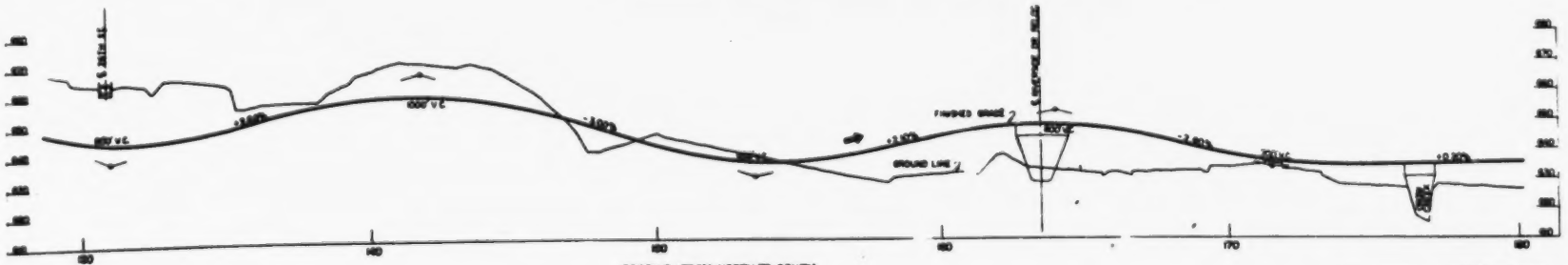
EXHIBIT C



PLAN



PROFILE - FROM SOUTH TO NORTH



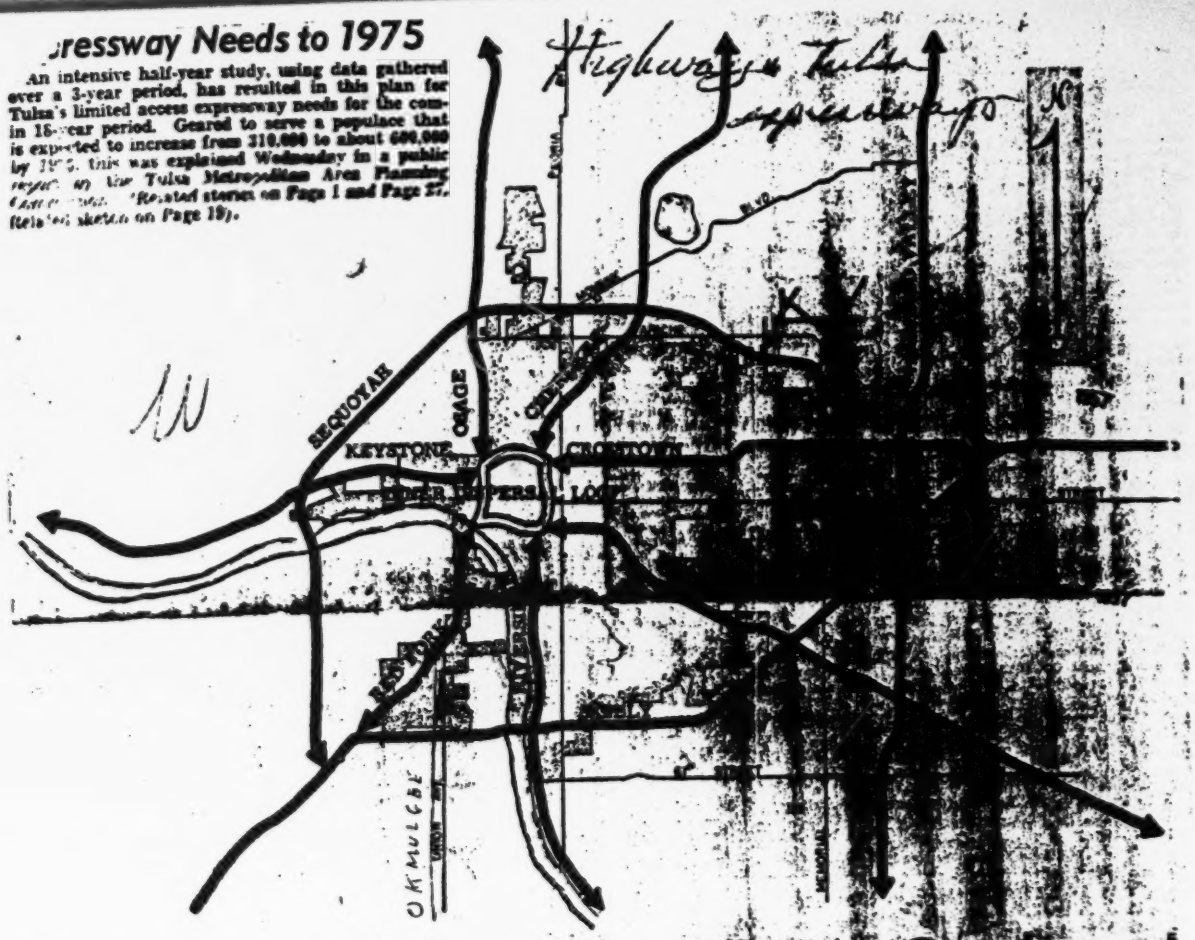
PROFILE - FROM NORTH TO SOUTH

CONTOUR INTERVAL ONE FOOT
DATUM IS MEAN SEA LEVEL
OKLAHOMA STATE PLANE COORDINATE SYSTEM

STATE OF OKLAHOMA
DEPARTMENT OF HIGHWAYS
ENGINEERING CONTRACT NO 174
TULSA METROPOLITAN AREA, TULSA COUNTY
RIVERSIDE ROUTE
DATE OF PHOTOGRAPHY MARCH 1958
ASSOCIATED EXPRESSWAY ENGINEERS, INC

...ressway Needs to 1975

An intensive half-year study, using data gathered over a 3-year period, has resulted in this plan for Tulsa's limited access expressway needs for the coming 18-year period. Geared to serve a populace that is expected to increase from 310,000 to about 600,000 by 1975, this was explained Wednesday in a public report by the Tulsa Metropolitan Area Planning Commission. Related stories on Page 1 and Page 27. Related sketch on Page 19.



Expressway System Plans Outlined

An expressway system for metropolitan Tulsa has been completed by the Tulsa Metropolitan Area Planning Area Planning Commission and Wednesday's report on the study shows general alignment of the 10 routes included in the network.

Another engineering will be required to "stake out" exact routes, but those defined in the Wednesday report are:

CROSSTOWN—It runs 9.2 miles from the northeast corner of the Inner Dispersal Loop, about 1st st. and Madison ave., east generally along the alignment of 1st st. to Lewis ave., then on east generally along Admiral blvd. for 3½ miles to the Howard (railroad) Spur, then northeast for a short distance to about Archer st., then due east again to the intersection with Skelly Drive. It has interchanges at Peoria, Utica, Lewis, Harvard, Yale, Sheridan, Sequoyah Express, Mingo rd. and Mingo Valley Express (U.S. 75).

BROKEN ARROW—Also known as the Kaiser Express, this route begins at the southeast corner of the ID Loop at about 13th pl. and Detroit ave., running east 1.3 miles to Lewis; just east of Lewis it straddles the MKT Railroad to ¼-mile west of Sheridan rd., where it swings north and east of the tracks to run southeasterly to 71st st., where SH 51 turns to the southeast. It has interchanges at Peoria, Utica, Lewis, Harvard, Yale at 31st, Sheridan, Evans-Finley at 41st, Mingo rd., Mingo Valley Express, Garnett rd., Mayo rd., 145th East ave., 161st East ave. and 177th East ave. It is about 14 miles long.

KEYSTONE—From the northwest corner of the ID Loop near Elwood ave. and Easton st., it quickly straddles the MKT Railroad and runs west about 3 miles, when it continues west running parallel to and immediately north of the MKT Railroad for the remainder of the distance to Keystone Dam, about 18.5 miles west of downtown Tulsa. It has interchanges at Union ave., 33d West ave., 49th West ave., Sequoyah Expressway, 65th West ave., 81st West and 97th West aves., Wilson ave. and 4th st. in Sand Springs and other interchanges as needed. Presence of the expressway and extension of SH 97 will make essential another span to the present 2-lane bridge over the Arkansas river south of Sand Springs.

RED FORK—From the southwest corner of the ID Loop at the 11th st. bridge, it runs about 7 miles to the Turner Turnpike gate, generally west of and parallel to Quanah-Sapulpa rd. Alignment through the West Tulsa business district, up to 41st st., which it crosses and goes over Sapulpa rd. at about 49th st., continuing parallel to Sapulpa rd. to the existing limited access facility stub north of Skelly Drive. It interchanges at Quanah ave., 17th and 23d sts., Union ave., 41st st., Skelly dr. and Sequoyah Expressway.

SEQUOYAH—Loops around the west, northwest and north parts of Tulsa for a total distance of about ¾-mile west of Harvard of the Turner Turnpike gate to the Crosstown Expressway at Memorial dr. It begins at about 60th st. and Red Fork Express. It runs generally along 57th West ave. across the Arkansas river to the Keystone Express, then northwest to an intersection with Osage Express to 21st st. North, then east to the Cherokee Expressway, and from there it swings slightly south of east for 2¼ miles to Sheridan ave. about ¼-mile south of Apache, crossing Santa Fe tracks, on east toward Memorial then south along the east side of Memorial dr. to the Crosstown.

RIVERSIDE—Begins at the southeast corner of the ID Loop, south of 17th pl. and Cincinnati ave. where it straddles the Midland Valley railroad continuing thus to a point just north of 31st st., where it swings to a general alignment of Riverside dr. and southward to 71st st. It interchanges at mile points from 21st to 71st., including an interchange with Skelly Drive.

SKELLY DRIVE—This is the almost-complete U.S. 66 bypass route.

OSAGE—From the northwest corner of the ID Loop, it runs generally along Elwood ave. to 36th st. North, then on to Sperry and Skiatook.

CHEROKEE—Beginning at the northeast corner of the ID Loop about 1st and Madison ave., it runs to and crosses the Santa Fe railroad then swings northeast, paralleling the rail line about 3 miles; swings north to [illegible] then northeast to [illegible] then [illegible] to 36th st. North, then on to Sperry and Skiatook.

MINGO VALLEY—This is the proposed realignment of U.S. 75, beginning at Owasso point south to Bird creek near 36th st. North where it swings alongside Garnett rd. [illegible] then near Pine st. it swings west to the half section line between [illegible] and Madison ave., and Elwood ave. and Easton st. Its exact locations are still locally [illegible] about property in the [illegible] very high and engineering [illegible] must be made to determine the most economically [illegible] route.

[illegible] model of this loop has been made, recently by Sherman Quigley, principal planner for the project, and will be exhibited [illegible] next few weeks at public [illegible] starting next week at the National Bank of Tulsa.

EXHIBIT D

Master Expressway Plan Bared

Jan 2 0 1957

Tulsa's future system of expressways, designed to speed traffic and ease for the metropolitan area's rapidly increasing traffic load, was presented in full "as is" this afternoon at a special report session at the Courthouse.

Prepared by the staff of the Tulsa Metropolitan Planning Commission with participation by some of the nation's top planning and traffic analysts, it showed the advantages of the following program:

1. Approval of a long-range plan for a system of expressways radiating in all directions from an inner dispersal loop around an enlarged business district.

2. The designation of a route roughly along the Frisco Railway from one turnpike to another as a Crosstown Expressway, and its possible termination [illegible]

interstate highway system and 90-10 per cent financing.

3. The designation of a route roughly along the Katy Railroad to Sand Springs and proposed Keystone Lake with a spur [illegible] the Turner Turnpike [illegible] at Skiatook, on the Keystone [illegible] prosperity.

4. The incorporation of the center of the city as an integral part of the interstate system in order to obtain, at a rate of 90 per cent federal to 10 per cent [illegible]

The only part [illegible] controversy today [illegible] expressway link [illegible] plan.

The TMPC [illegible] divided over the route—it should cross the stream at the 11th street bridge, west along the [illegible] southbranch south [illegible] 57th [illegible] and county offic[illegible] leaders also have e[illegible] presence of opinion e[illegible]

[illegible] chairman, [illegible] inner di[illegible] and said [illegible] can be [illegible] basis either along [illegible] route, [illegible] Park Expressway [illegible] along [illegible] route.

[illegible] said another [illegible] the Turnpike [illegible] Riverside drive near [illegible] Valley (Eastern) [illegible]

[illegible] went to establish [illegible] system, and just one [illegible] two [illegible] Dunlap said.

[illegible] want to present [illegible] acts possible and a[illegible] based on a cost [illegible] of affected parties," [illegible] said. [illegible] an impasse ex[illegible] in [illegible] of the west [illegible] for [illegible] expressway [illegible] the [illegible] Dunlap said e[illegible] [illegible] all the facts [illegible] [illegible] Department [illegible]

[illegible] expressway system, as [illegible] today, would include three [illegible]

[illegible]—To carry heavy [illegible] traffic and link [illegible] Expressway (Ft. Bysse[illegible]) of Tulsa, to the northeast [illegible] of the Inner Dispersal [illegible] and distance of [illegible] miles.

[illegible]—To serve [illegible] area north [illegible] and the power [illegible] Black Creek [illegible] 7.1 miles.

[illegible]—To serve [illegible] and areas northeast [illegible]

EXPRESSWAY page 5

Expressway

Continued from Page [illegible]

[illegible] district and industrial [illegible] the Santa Fe T[illegible] [illegible] begin at the northeast [illegible] the loop and run [illegible] N. and Yale [illegible] long westledge [illegible]

[illegible] Arrow—T[illegible] [illegible] corner of the [illegible] Detroit Ave[illegible] right-of-way [illegible]

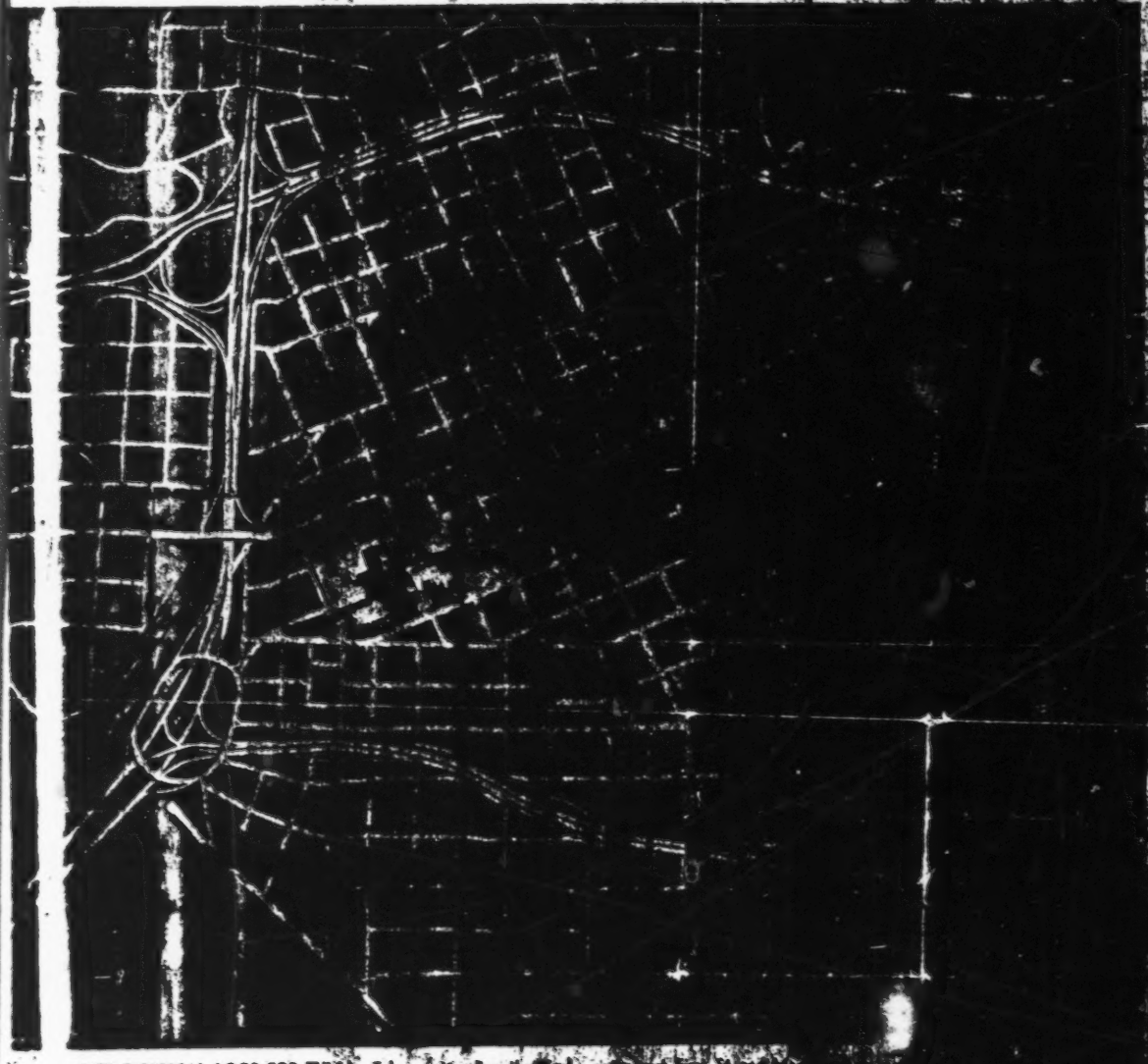
[illegible] Drive—[illegible] areas south [illegible] district and east of [illegible] from [illegible] along [illegible] Mingo Valley [illegible] to about 21st [illegible] south to 4.2 [illegible] drive to Th[illegible]

[illegible] Turnpike—[illegible] of [illegible] bridge, [illegible] interchange [illegible] another to be [illegible] north along a [illegible] west of and parallel [illegible] avenue-Sapulpa [illegible] distance.

[illegible]—[illegible] [illegible] Springs city [illegible] 4.6 miles along the K[illegible]

[illegible]—Until [illegible] city starting near th[illegible] Turner Turnpike and on the east near Ma[illegible] and Crosstown Expre[illegible]

Mingo Valley — Cars [illegible] about Tulsa [illegible] of Sa[illegible] and Sapulpa [illegible] would begin a [illegible] route to Tul[illegible] distance between [illegible] exit roads.



INNER DISPERSAL LOOP FOR TULSA—Tulsans attending the [illegible] expressway report session at the Courthouse today were shown this [illegible] of the proposed expressway loop around the downtown business district. It was photographed by a Tribune photographer as it was erected this morning. The reader is looking north toward the business district from about 10th street. At the lower left is a complicated circular interchange to be located at the east end of the 11th street bridge on which cars would travel on the top before descending to one of three lower levels. Lower right is a cloverleaf interchange at about 13th St. and the Midland Valley tracks to handle traffic of the Broken Arrow Expressway coming from the east and the Riverside Expressway from the south. At upper right is a complicated interchange [illegible] from the east [illegible] Turnpike interchange [illegible] Chicago, Expressway [illegible] to the west. The [illegible] avenue and would link [illegible] Keystone Dam. The dark [illegible] would be built [illegible] ground. [illegible] Contemporary styled buildings [illegible] proposed Tulsa Civic Center [illegible] will be home [illegible]

EXHIBIT E

INNER DISPERSAL LOOP FOR TULSA—Tulsans attending the final ... report session at the Courthouse today were shown this model ... proposed expressway loop around the downtown business district. ... photographed by a Tribune photographer as it was erected this morning. ... reader is looking north toward the business district from about 10th ... et. At the lower left is a complicated circular interchange to be located ... the east end of the 11th street bridge on which cars would travel on the ... loop before descending to one of three lower levels. Lower right is a clover-... interchange at about 13th St. and the Midland Valley tracks to handle ... traffic of the Broken Arrow Expressway coming from the east and the River-... side Expressway from the south. At upper right is a complicated interchange ... [illegible] ... Keystone Dam. The ... would be built under ... Contemporary style buildings ... proposed Tulsa Civic Center ... will be home for federal, county ...

EXHIBIT E

... Expressway

... from Page 1 ...

... and industrial ... Santa Fe ... the loop and ... N. and Tulsa ... wedge of ...

... Arrow—T ... corner of the ... Detroit Ave. ... right-of-way ...

... side Drive—... across south ... ket and east ... from ... to the ... Valley ... to ab ... drive to ...

... Expressway ... ner of downtown ... Springs city ... 4.5 miles along the ... city starting near ... Turner Turnpike ... on the east near ... and Cimarron Expre...

Mingo Valley — ... about Tulsa ... and Sequoyah ... would begin a ... route to ... distance between ... nett roads.

... pose 5

... [illegible] ... [illegible] ... [illegible]

EXHIBIT G

Tulsa Metropolitan Area

PLANNING COMMISSION

406 SOUTH DENVER
TULSA 3, OKLAHOMA

CITY OF TULSA
FILED
JUL 26 1957
10 A. M. ..... P. M.
A. JACKSON LAWRENCE, City Auditor
By .....

July 26, 1957

The Honorable Board of City Commissioners
City Hall
Tulsa, Oklahoma

Gentlemen:

We, herewith, transmit for your approval the "Tulsa Metropolitan Area Expressway System as a part of the Official Master Plan of the Tulsa Metropolitan Area." This plan represents over a year's intensive study of Tulsa's thorofare needs conducted in cooperation with the Oklahoma State Highway Department, Bureau of Public Roads and City and County Engineering staffs.

The plan takes into account existing traffic needs, future traffic needs, future residential, industrial, and commercial developments; the effect on existing residential, industrial and commercial areas and the most economical expenditure of public funds consistent with the general welfare of the community.

The Tulsa Metropolitan Area Planning Commission respectfully recommends your approval of this plan as a part of the Official Master Plan.

Respectfully submitted,

Glen R. Turner

Glen R. Turner
Director

GRT:mlb

EXHIBIT H

RESOLUTION

ADOPTING A TULSA METROPOLITAN AREA EXPRESSWAY PLAN AS PART OF THE TULSA METROPOLITAN AREA THOROFARE PLAN, AUTHORIZING AND DIRECTING SUBMISSION THEREOF TO THE CITY OF TULSA AND TULSA COUNTY BOARDS OF COMMISSIONERS FOR THEIR INFORMATION AND AUTHORIZING AND DIRECTING THE PROPER FILING THEREOF

WHEREAS, The Tulsa Metropolitan Area Planning Commission entered into a Cooperative Expressway Planning Program by agreement with the Oklahoma State Department of Highways on January 15, 1957, for the purpose of preparing a thorofare plan with particular emphasis on location and capacities of and access to expressways within the jurisdiction of the Planning Commission and the City of Sand Springs, and

WHEREAS, Said studies have culminated in the preparation of a proposed expressway system plan attached hereto and made a part hereof as Exhibit "G", and

WHEREAS, The Tulsa Metropolitan Area Planning Commission is required to make and adopt an official Master Plan of the area, as provided in Section 863.7, Title 19, Oklahoma Statutes, and

WHEREAS, It is deemed necessary, desirable and in the public interest that said Tulsa Metropolitan Area Expressway System which shows the general location

of proposed expressways, be adopted as part of the Official Master Plan of the Tulsa Metropolitan Area, and

WHEREAS, The Tulsa Metropolitan Area Planning Commission did by resolution on the 3rd day of July, 1957, call a public hearing for the 24th day of July, 1957, and duly gave public notice thereof for the purpose of considering the adoption of the Tulsa Metropolitan Area Expressway System Plan as part of the Official Master Plan of the Tulsa Metropolitan Area, and

WHEREAS, Said public hearing was held this 24th day of July, 1957, and

WHEREAS, After due study and deliberation it is deemed advisable and in keeping with the purposes of the Planning Commission as set forth in Section 863.7, Title 19, Oklahoma Statutes to adopt said Expressway System.

NOW, THEREFORE, BE IT RESOLVED That said Tulsa Metropolitan Area Expressway System as presented at said public hearing, a true and correct copy thereof entitled "EXPRESSWAY SYSTEM a Part of the Official Master Plan" bearing the date of June 28, 1957 being attached hereto as Exhibit "G", and made a part hereof, be and the same is hereby adopted as a part of the Official Master Plan of the Tulsa Metropolitan Area; and

BE IT FURTHER RESOLVED That the Chairman, or in his absence the Vice Chairman, be and is hereby authorized and directed to submit forthwith said amendment to the Board of Commissioners of the City of Tulsa and to the Board of County Commissioners of Tulsa County, for their approval as provided by law.

APPROVED AND ADOPTED This 24 day of July, 1957, by a majority of the full membership of said Commission including its ex officio members, as provided by law.

/s/ Ed Lubie

Chairman

Attest: /s/ D. E. Martin
Secretary

APPROVED BY THE BOARD OF COMMISSIONERS OF THE CITY OF TULSA, OKLAHOMA, this 26th day of July, 1957;

Attest: _____
City Auditor Mayor

Approved as to form: _____
Asst. City Attorney

APPROVED BY THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF TULSA, OKLAHOMA, this 25th day of July, 1957:

Attest: _____
County Clerk Chairman

Approved as to form: _____
Asst. County Attorney

APPENDIX G

IN THE DISTRICT COURT WITHIN AND FOR
TULSA COUNTY
STATE OF OKLAHOMA

No. 115765

EMPIRE CONSTRUCTION, INC.,
an Oklahoma corporation
Plaintiff

vs.

THE CITY OF TULSA,
a municipal corporation
Defendant

AMENDMENT TO PETITION

Comes now the plaintiff, Empire Construction, Inc. and amends its petition by adding the following paragraph to its First Cause of Action at 3 of its Petition:

V(a)

By a letter addressed to the City Engineer of the City of Tulsa, the Department of Highways of the State of Oklahoma referred specifically to the above described real property ("Layman property") and directed the defendant City of Tulsa to "take whatever action is necessary to protect the planning for the expressway." Said letter further advised the defendant City that "the entire Layman property will be required for the construction." A copy of said letter is hereto annexed as *Exhibit I.*

WHEREFORE, having amended its petition by

adding the above stated paragraph V(a), the plaintiff re-adopts its prayer for judgment as set forth in its original petition herein.

HOUSTON, KLEIN & DAVIDSON

By L. MICHAEL HAGER
Attorneys for Plaintiff
Empire Construction, Inc.

CERTIFICATE OF MAILING

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Amendment to Petition was this 13th day of March, 1968, mailed to the office of the City Attorney, Charles E. Norman, City Hall, Tulsa, Oklahoma, with postage fully prepaid.

L. MICHAEL HAGER

EXHIBIT I

DEPARTMENT OF HIGHWAYS

November 8, 1962

Mr. William R. Wooten
City Engineer
Municipal Building
Tulsa, Oklahoma

Re: Riverside Route
Tulsa

Dear Sir:

Reference is made to your letter dated October 23, 1962, directed to our Right-of-Way Engineer, in which you direct our attention to improvements contemplated for the Layman property. Inasmuch as previous discussions regarding highway planning have involved various division of the Department, it is felt that a reply from my office can better encompass the whole of the situation.

You are aware that a great deal of money has been expended on planning and plans preparation for the construction of the project involving the Layman property. At the time the long range planning for Tulsa metropolitan area road improvements was commenced, your city was made aware of the necessity of protecting the monies and time invested in the planning. The project which will require the Layman property for roadway purposes is in an area where acquisition is one hundred percent city responsibility, and as previously agreed, your city should take whatever action is necessary to protect the planning for the expressway.

Bureau of Public Roads funds have participated in the preliminary engineering, and it is our feeling that a change in the project as planned could result in withdrawal of Federal funds from the project. As previously stated, it is

our feeling that your city should take whatever action is necessary to protect the monies which have been invested in the planning, and as the entire Layman property will be required for the construction, no problem should be encountered because of partial take.

Yours Very truly,

F. D. Lyons
Director

cc: Chief Engineer
Urban Design
Guy Hall

Exhibit I

APPENDIX H

IN THE DISTRICT COURT IN AND FOR
TULSA COUNTY, OKLAHOMA

No. 115765

EMPIRE CONSTRUCTION, INC.,
an Oklahoma corporation
Plaintiff

vs.

THE CITY OF TULSA, OKLAHOMA,
a municipal corporation
Defendant

SECOND AMENDMENT TO PETITION

Comes now the plaintiff, Empire Construction, Inc., and amends its petition by adding the following paragraph to its First Cause of Action at 3 of its petition:

V(b)

By Ordinance No. 8283 the defendant City of Tulsa established as limited access facilities within the corporate limits of the City of Tulsa all streets and avenues (including the said Riverside Expressway) included in the extention of the Master Street Plan enacted by the Resolution referred to in Paragraph V. A copy of said Ordinance is hereto annexed as *Exhibit "J"*.

V(c)

By written agreement with the State Highway Commission of the State of Oklahoma, dated August 1, 1961,

the defendant City of Tulsa recognized the need for and adopted a policy of making advance payments to the owners of property in the path of the Crosstown Expressway, a part of the said Master Expressway Plan which includes the said Riverside Expressway. A copy of said agreement is hereto annexed as *Exhibit "K"*.

WHEREFORE, having amended its petition by adding the above stated paragraphs V(b) and V(c), the plaintiff readopts its prayer for judgment as set forth in its original petition herein.

HOUSTON, KLEIN & DAVIDSON

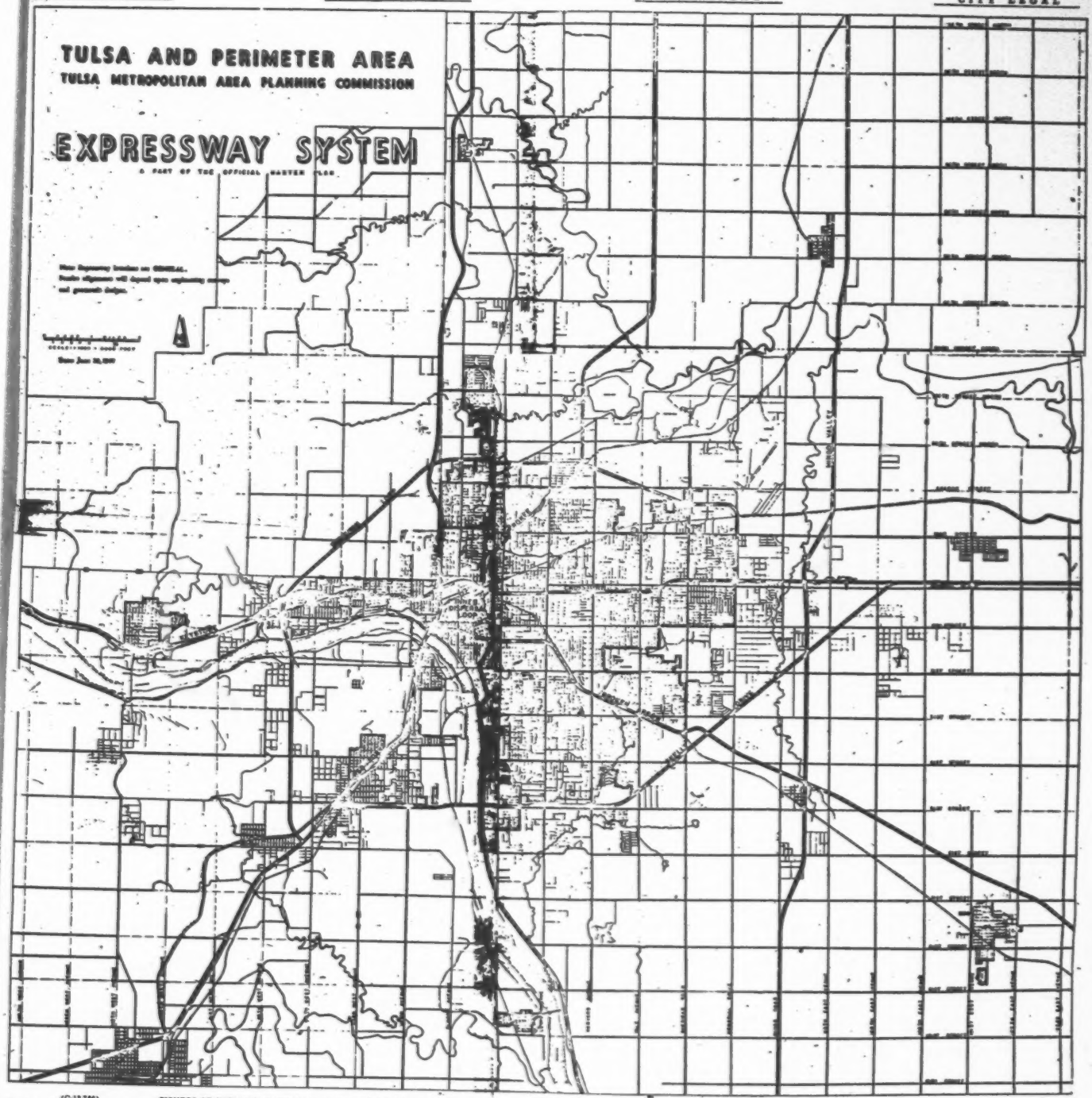
By_____

Attorneys for Plaintiff

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the above and foregoing Second Amendment to Petition was this _____ day of May, 1968 mailed to the office of the City Attorney, Charles E. Norman, City Hall, Tulsa, Oklahoma, with postage fully prepaid.

L. Michael Hager


TULSA AND PERIMETER AREA
TULSA METROPOLITAN AREA PLANNING COMMISSION
EXPRESSWAY SYSTEM
A PART OF THE OFFICIAL MASTER PLAN

(C-12,766)

(Published in the Tulsa Daily Legal News, Sept. 15, 1957, Baxter Publishing Co., Publishers.)

ORDINANCE NO. 8888

AN ORDINANCE ESTABLISHING AN LIMITED ACCESS FACILITIES WITHIN THE CORPORATE LIMITS OF THE CITY OF TULSA ALL STREETS AND AVENUES INCLUDED IN THE EXTENSION OF THE MASTER STREET PLAN OF THE CITY OF TULSA ENACTED BY RESOLUTION NO. 8000, DECLARING THE COSTS OF THE IMPROVEMENT THEREOF TO BE COSTS OF AN IMPROVEMENT OF A GENERAL NATURE; PROVIDING FOR THE REGULATION AND CONTROL OF TRAFFIC USING SAID LIMITED ACCESS FACILITIES BY CONTINUING IN FORCE ALL PROVISIONS OF THE TRAFFIC CODE NOW APPLYING TO SAME; RESERVING THE EFFECTIVENESS OF ALL ORDINANCES AND PARTS OF ORDINANCES IN THE ZONING CODE AS TO IMPROVEMENTS ON PROPERTY ABUTTING ON LIMITED ACCESS FACILITIES; AND DECLARING AN EMERGENCY.

BE IT ORDAINED BY THE MAYOR AND BOARD OF COMMISSIONERS OF THE CITY OF TULSA, OKLAHOMA:

Section 1. Additions to Existing Limited Access Facilities System Established. Costs To Be Of A General Nature. Additions to the existing system of Limited Access Facilities in the City of Tulsa consisting of the streets, avenues and parts of streets and avenues hereinafter identified, are hereby established and created within the corporate limits of the City of Tulsa, and in recognition of the general use of the streets and avenues therein included, and of the wear, tear and destruction of the grading, drainage, guttering pavement and improvements thereof by heavy general traffic, passenger buses and bus routes, trucks and motor freight transportation, the constructing, acquisition of rights-of-way, straightening, widening, grading, draining, paving, guttering, improving and maintaining of the Limited Access Facilities of the City of Tulsa are declared to be improvements of a general nature, and to the extent that the cost thereof exceeds the benefits to the abutting property owners, such costs are declared to be costs for improvements of a general nature for the benefit of the entire City.

Section 2 Streets In Master Street Plan To Be Limited Access Facilities. All streets shown on the extension of the master street plan so established by Resolution No. 8000 which became effective July 16, 1957, together with map therein mentioned and referred to, said map being hereto attached and made a part hereof, are hereby declared to be Limited Access Facilities of the City of Tulsa, within the authority, provisions and definitions of Senate Bill No. 200 enacted at the regular session of the Twentieth Oklahoma Legislature on April 18, 1945, and approved by the Governor on May 5, 1945, as enacted by House Bill No. 428 enacted by the Twenty-second Legislature of the State of Oklahoma and approved by the Governor on the 13th day of May, 1949

Section 3. Regulation Of Use Of Limited Access Facilities. Use of the Limited Access Facilities of the City of Tulsa shall be regulated and controlled by the Traffic Code and amendments thereof now or hereafter in force.

Section 4 Zoning Code Not To Be Affected. Nothing herein contained shall be deemed or construed to affect any of the Zoning Codes of the City of Tulsa now or hereafter in force.

Section 5. That an emergency is hereby declared to exist for the preservation of the public peace, health and safety, by reason whereof this ordinance shall take effect from and after its passage, approval and publication.

PASSED, with the emergency clause ruled upon separately and approved this 17th day of September, 1957.

APPROVED, this 17th day of September, 1957.

GEORGE K. NORVELL,
Mayor

Attest:
A. JACKSON LAWRENCE,
City Auditor
(SEAL)

Approved:
DARVEN L. BROWN,
City Attorney

EXHIBIT J

EXHIBIT K

AGREEMENT

This agreement entered into this 1st day of August, 1961, between the State Highway Commission of the State of Oklahoma, hereinafter known as the Commission, and the City of Tulsa, Oklahoma, a municipal corporation, hereinafter known as the City, in conformance with 69 O. S. 1951, Section 11.5 for the purposes hereinafter set out:

WHEREAS, the Commission and the Bureau of Public Roads with the concurrence of the City has hithertofore designated and planned certain highway improvements in the City as a part of the National System of Interstate and Defense Highways, which approximate locations and various sections are depicted and identified on Exhibit "A" hereto attached, and

WHEREAS, it is estimated that the actual construction of the total program will be accomplished over the next ten to twelve years, and

WHEREAS, federal funds are available to pay up to 90 per cent of the cost of rights-of-way required for the construction, and

WHEREAS, the City is required by law to furnish funds necessary to match federal aid funds *and* rights-of-way acquisition, which cost is estimated, at this time, to be $3,000,000 for sections 5 and 6 and so much of section

4 as is contained within the corporate limits of the City, all as shown on Exhibit "A" and labeled Crosstown Expressway, and

Whereas, certain property owners within the proposed rights-of-way limits may be seriously affected as a result of the time lapse between the location and public establishment of these routes and the actual purchase of property needed for rights-of-way, and

WHEREAS, the City is agreeable to depositing its part of the estimated cost with the State to be used as a hardship case purchase fund during this interim period:

NOW, THEREFORE, the parties agree as follows to-wit:

The City agrees:

1. To deposit with the Commission $1,000,000 on or before July 15, 1961.
2. To deposit an additional $1,000,000 on or before February 15, 1962.
3. To deposit the additional $1,000,000 within two (2) years.
4. To originate standards and implement procedures consistent with Bureau of Public Roads' regulations as necessary to determine individual hardship cases to be purchased by the Commission with these deposits.

The State Agrees:

1. To accept the City's deposits within the terms and

subject to all the conditions and intentions of the law and the parties hereto and to use said monies only for the objectives contained in this agreement.

2. That, if for any reason, the completion of such highway construction program or any part thereof as herein contemplated cannot be accomplished, then in that event, it will return to the City the pro rata unexpended balance of the deposits and convey to the City the properties previously purchased with its money.
3. That it will program under "E" Program with the Bureau of Public Roads those sections of Crosstown rights-of-way wherein City funds are expended for hardship case purchases same being located in sections 5 and 6 and that part of section 4 lying within the corporate limits of the City.
4. That it will purchase within Bureau of Public Roads' regulations those properties designated by the City as hardship cases.
5. That it will schedule additional rights-of-way purchases in these areas within the funds available for such purchases under the Bureau's contract control of federal allocations.
6. That it will assume responsibility for property management on the tracts acquired under this agreement and will endeavor, within the limits of Bureau's regulations, to protect the neighborhood

affected and to utilize good business practices in protecting improvements, investments, and recovering rental returns where possible.

The parties further agree that all hardship purchases will be made from City's deposit of funds and that no purchases will be made at any time beyond the limits of City's $3,000,000 deposit until stage conversion of these sections from program "E" to stage "2" and normal rights-of-way acquisition is implemented.

IN WITNESS where of the parties hereto set their hands and seals the day and year first above written.

CITY OF TULSA, OKLAHOMA

James L. Maxwell

ATTEST: Mayor 8-1-61

William F. Lambert
City Auditor 8-1-61

STATE OF OKLAHOMA

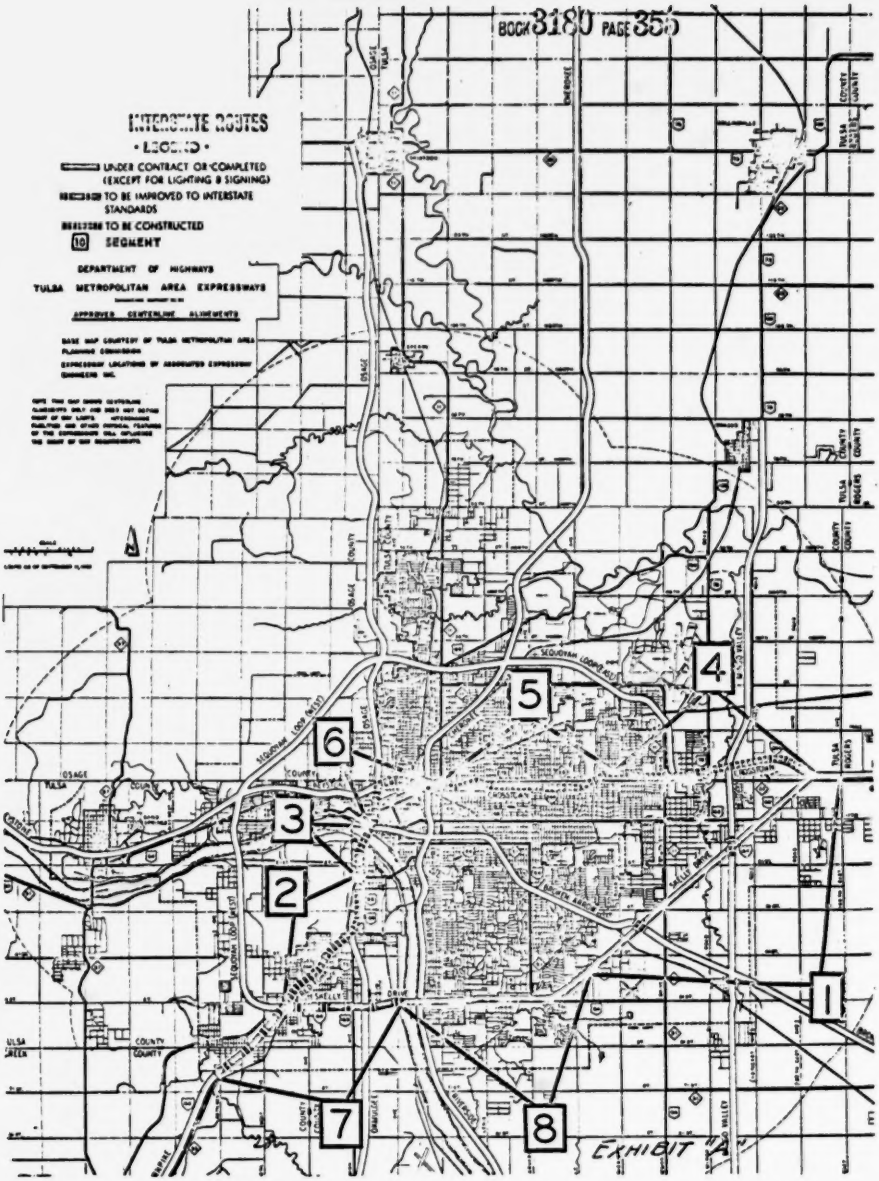
APPROVED: DEPARTMENT OF HIGHWAYS

Charles E. Norman
City Attorney 8-1-16

F. D. Jones
Director

EXHIBIT A

BOOK 3180 PAGE 355



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Supreme Court of the United States

October Term 1973

EMPIRE CONSTRUCTION INC.,
an Oklahoma corporation
Petitioner

VERSUS

CITY OF TULSA, OKLAHOMA
a municipal corporation
Respondent

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

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Assistant City Attorney
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WAYNE R. SCOTT CO. TULSA, OK 74120
507 S. QUAKER ● (918) 587-7806

HARVEY SHARP OKLA. CITY, OK 73102
407 REGENCY TOWER ● (405) 232-0963

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CONSTITUTIONAL

Oklahoma Constitution, Article 2, Section 24 1

United States Constitution, Article V 1

No. 73-642

Supreme Court of the United States

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EMPIRE CONSTRUCTION INC.,
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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

QUESTION PRESENTED

(1) Whether the adoption by the Respondent by resolution of a Tulsa Metropolitan Area Expressway Plan constitutes a "taking" of private property for a public use in contravention of the Oklahoma Constitution, Article 2, Section 24, and the United States Constitution, Article V.

REASONS FOR DENYING THE WRIT

(1) The Federal question herein presented has previously been determined by this Court.

The question of "plans" by a condemning authority constituting a "taking" is an ancient question which has previously been determined by this Court.

In the case of *Willink v. United States*, 240 U.S. 572, 60 L.Ed. 808, 36 S.Ct. 422, Willink sued to recover damages for an alleged taking of this property in the improvement of the harbor in the Savannah River at Savannah, Georgia. On May 4, 1889, the United States established a harbor line in such a manner that a part of Willink's land was brought within the harbor area. In 1890 a project was approved by Congress to cut away a portion of Willink's land. A contract was made, but the work was never done or undertaken. The Court of Claims denied recovery and this Court affirmed the judgment, stating:

> "Upon these facts, as before indicated, the court (Court of Claims) held that he (Willink) was not entitled to recover.
>
> We reach the same conclusion, and for the following reasons:
>
> There was no actual taking of any of the claimant's property, nor any invasion or occupation of any of his land. As respects his upland, he was not in any wise excluded from its use, nor was his possession disturbed. Something more than the location of a

> harbor line across the land was required to take it from him and appropriate it to public use. (Citations omitted).

In *Danforth v. United States*, 308 U.S. 271, 74 L.Ed. 240 (1939), the question arose as to the date of "taking". Danforth alleged that the date of "taking" was the enactment of legislation.

> This Court stated in the *Danforth* case that:
>
> "Condemnation is a means by which the sovereign may find out what any piece of property will cost. 'The owner is protected by the rule that title does not pass until compensation has been ascertained and paid . . .' A reduction or increase in the value of property may occur by reason of legislation for or the beginning or completion of a project. Such changes in value are incidents of ownership. They cannot be considered as a "taking" in the constitutional sense . . . The mere enactment of legislation which authorizes condemnation of property cannot be a taking. Such legislation may be repealed or modified or appropriations may fail."

Finally, in the case of *Reservation Eleven Associates v. District of Columbia*, 420 F.2d 153 (1969), Reservation asserted that their property should be treated as a single unit, irrespective of alleys dividing their property into sections. The District of Columbia had refused to close the alleys upon application made by Reservation prior to the condemnation suit, because the center leg of the inner city freeway was to go through the alleys under plans which were being considered.

This Court stated in the *Reservation* case, supra, at page 157, as follows:

> "We conclude by pointing out that general plans affecting market value, especially when they depend on a positive grant or exchange from the government are not a "taking" subject to compensation under the Fifth Amendment.
>
> The fact that future governmental needs may operate to prevent an alley closing now does not mean the government must compensate for this lost value on condemning the property. 'The law of eminent domain is fashioned out of the conflict between the people's interest in public projects and the principles of indemnity to the landowner.' In general there is room for the doctrine that the government cannot use the threat of eminent domain to drive down established market values. But in making this balance, not all effects of government action or plans on value can be compensated.
>
> The announcement or even internal consideration of general government planning, long before any condemnation activities, may have an effect on value of lands involved, sometimes a beneficial, sometimes an adverse effect. That the effect, is adverse does not mean the government is required to compensate affected landowners for possible decreases in their land value when it comes to select specific properties for its project."

From an examination of these authorities one can see that this Court has specifically held that general plans

affecting market value are not a taking subject to compensation under the Fifth Amendment.[1]

Highway construction is an expensive and time-consuming project. In order to have any beneficial use, plans must be made to tie in to federal, state, county and city projects. Plans are necessary to estimate costs of right-of-way and construction. For today's voter, plans are necessary to sell the taxpayer on the project so bonds can be voted and issued. During this process of developing the project, plans can be changed or cancelled entirely.

Thus, in the case at bar, the Riverside Expressway was never constructed. The Oklahoma State Department of Highways has dropped this project from its plans and no funding is available for right-of-way or construction.

Empire Construction Company's situation is not materially different from the facts previously presented to this Court.

(2) The Empire Construction Company petition does not present any question which shows a change in conditions requiring a review of existing law.

The question presented herein is as old as the

[1] *Reservation Eleven Associates v. District of Columbia*, 420 F.2d 153 (1969).

sovereign's power of eminent domain. The law of eminent domain is fashioned out of the conflict between the people's interest in public projects and the principles of indemnity to the landowners.[2]

In Oklahoma alone, there are thousands of miles of expressways "planned" by various authorities. To require the condemning authority to compensate the landowner solely on the basis of an adoption of a plan would do one of two things. It would either stop planning, or it would force the condemnor to formulate its plans in secret without citizen input. Either of these results would not be in the best interests of the public.

The conditions under which this Court has held that general plans affecting market value are not a "taking" subject to compensation under the Fifth Amendment have not changed to warrant a re-examination of the federal question.[3]

CONCLUSION

The city of Tulsa has not actually "taken" or imposed any retraints upon Petitioner's land which would deny him the use of his property. The question presented

[2]*United States ex rel for Use of TVA v. Powelson*, 319 U.S. 266, 280, 63 S.Ct. 1047, 1055 (1943).

[3]*Reservation Eleven Associates v District of Columbia*, supra.

has previously been ruled on by this Court and the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

David Nelson
Assistant City Attorney
200 Civic Center, Room 1012
Tulsa, Oklahoma 74103

CERTIFICATE OF SERVICE

I hereby certify that three true and correct copies of the above and foregoing Brief in Opposition to Petition for a Writ of Certiorari were delivered to:

Robert L. Davidson
Attorney at Law
900 Sooner Federal Building
404 South Boston
Tulsa, Oklahoma

this _____ day of October, 1973.

David Nelson